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NOTES OF INDIAN CASES.

Radhakant Lal *v.* Nazma Begum : I L. R. 45 C. 733 (P.C.)

Though there is some room for doubt as to the exact significance of an observation here or a remark there, we think that the judgment in this case taken with their Lordships' pronouncements in *Lal Bahadur* v. *Kanhaiya Lal* [1] and *Suraj Narain* v. *Ratan Lal* [2] makes it fairly clear that while the existence of a nucleus of ancestral property in the hands of a father will throw upon him (or those claiming under him) the onus of proving hat other properties acquired by him are his separate estate, a finding of separate acquisition will suffice to throw back upon those who claim to give such acquisition a joint character the onus of establishing such change of character. But reading through the three judgments one cannot help feeling that in their Lordships' view the latter onus is pretty easily discharged. For instance, if at a time when the father had no sons and it was therefore not necessary for him to keep up the distinction between his ancestral property and his acquired property, he keeps a joint account, their Lordships will probably be inclined to treat even this and certainly the continuance of this system after the birth of sons, as proof of blending so as to make the whole one common stock. Having regard to the ways and habits of Indians, it is possible to attach too much importance to their manner of keeping accounts, especially family accounts. Where other members of the family also have their earnings and the earnings of all whether small or large are indiscriminately brought and dealt with together, the position is of course clearer.

The question whether the father having once brought an item of his own earning into the common account kept by him could afterwards take it out and use it as his own was left

1. (1907) I. L. R. 29 A. 244. (P. C.) 2. (1917) I. L. R. 40 A. 159. (P. C.)

open in *Suraj Narain* v. *Ratan Lal* [1]. But in the present case their Lordships broadly state that "properties once brought into a common stock cannot be taken out of it again." It is noteworthy that in setting aside that portion of the Sub-Judge's decree which upheld a gift by the father *to the extent of his share* their Lordships do not base their conclusion on any peculiarity of the law as accepted in Bengal but take the broad ground laid down in *Appuvier's case* [2] that no member has any separate share, for, 'the whole property belongs to the one Hindu family and accrued upon his death to the surviving members.'

Janardan Govind *v.* **Narayan Krishnaji**: I. L. R. 42 B. 420.

Much as we appreciate the point of view so vigorously presented by Beaman, J., in this case and the reasons suggested by him for the omission of the Indian Legislature to enact in terms in respect of the transmission of the decrees of our courts to Native State tribunals, for purposes of execution, we are not persuaded that the contrary view taken by a Full Bench of the Madras High Court in *Pierce Leslie* v. *Perumal* [3], sacrifices considerations of sense and substance to mere verbal quibbles. That the Indian Legislature contemplated a degree of reciprocity (in matters of execution proceedings) between courts in British India and the tribunals of Native States is of course beyond dispute; but that did not prevent the High Court of Bombay from holding (in *Nabibhai* v. *Dayabhai* [4]) that a Native Court's decree may by our law of limitation become incapable of execution in British India even while it remains executable in the Native State itself. Limitation is a matter of positive law and general statements as to underlying principles such as that the object of the law of limitation is to punish the negligent suitor and reward the diligent, help one very little in the task of interpreting the terms of the Statute. The question under discussion turns on the true meaning of the reference to 'execution' in cl. 5 of the 3rd column of Art. 182. The application *for execution* contemplated by that clause can reasonably be held only

1. (1917) I. L. R. 40 A. 159 (P. C.)
2. (1866) 11 M. I. A. 75
3. (1917) I. L. R. 40 M. 1069.
4. (1916) I. L. R. 40 B. 504.

to refer to an application to a British Indian Court, because the expression 'proper court' occurring in that clause is defined in Explanation II as meaning the court whose *duty* it is to execute the decree or order and it is scarcely right for the Indian Legislature to postulate a duty on the part of Native State tribunals to execute the decrees of British Indian Courts. The Bombay Judges accordingly rely more on the other part of the clause, namely, that relating to 'step-in-aid' of execution and they hold that an application to a British Indian Court to send its decree for execution to a Native Court may within the meaning of that portion of the clause furnish a fresh starting point for a later application for execution made to the Britfsh Indian Court itself.

In fairness to the Judges who decided *Pierce Leslie* v. *Perumal* [1] it must be noted that both the referring Judges were inclined to this view and yet Oldfield, J., when he sat on the Full Bench saw reason to change his opinion. It seems to us oo much to hold (with Bakewell, J.) that the transmission of a decree to a Native State Court is covered by S. 39 of the Code. It is possible (as pointed out by Wallis, C. J.) that a particular Native State may not require any *communication from the British Indian Court* at all and may be prepared to take action, as much in the way of execution as in the way of regular suit, upon mere production of a certified copy of the decree and a sworn statement by the decree-holder as to non-satisfaction. In such a case no preliminary application to the British Indian Court would be necessary and an uncalled for application cannot certainly bring the case within Cl. 5 of Art. 182. Even where an application to and a transmission by the Court in British India may be necessary to enable the decree-holder to initiate execution proceedings in the Native Court, the question still remains, can such an application be held to be a 'step-in-aid of execution' meaning *execution in British India*. A mere step-in-aid of execution in the Native Court will obviously not suffice, for, otherwise, even petitions to that Court will have to be recognised as fresh starting points for new proceedings in British India. The Bombay Judges argue that the transmission to the Native Court is an aid to execution in British India because it will "in the result aid the British Indian

1. (1917) I. L. R. 40 M. 1069.

Court to get its decree executed where it could by no means execute it for itself." As interpreted by a long course of decisions, the expression 'step-in-aid' has been used by the Indian Legislature in reference to acts taken *in furtherance* of execution proceedings and if the word 'execution' is to be understood as signifying execution *in British India,* it seems to us illogical to bring under the category of 'Steps-in-aid' an act the avowed reason for which is the impracticability of taking further execution-proceedings *here* and the very object of which is to see whether the decree cannot be satisfied without resort to execution proceedings *here.* Heaton, J., puts it as a test that any satisfaction obtained by executing the decree in the Native State will go in reduction of the amount for which the decree can be executed here; but that seems to us to carry the matter no further than any private payment in satisfaction of the decree or any realisation by a suit in a foreign Court on the British Indian judgment. In all these cases, it appears to us that the executing Court in British India can take note of such payment or satisfaction only if steps had been taken to certify the same to that court in the manner provided in O. 21. R. 2 and in this view the proposed test affords little help in answering the main question.

Bhagwandas Parasram *v.* Burjorji Ruttonji: I. L. R. 42 B. 373 (P. C.)

The precise basis of their Lordships' decision in this case is not clear. The plaintiffs as Pakka Adatias sued the defendant, their principal or constituent, for recovery of moneys paid by them as differences on certain forward contracts entered into by them under instructions from the defendant. Their Lordships accept the incidents of a Pakka Adatia employment as described in *Bhagwandas* v. *Kanji* [1]. On the same footing Justice Beaman as trial Judge seems to have emphasised the agency aspect of the transaction and given the plaintiffs a decree, but the appellate bench held that the Pakka Adatia was something more than a mere broker and in fact a principal as between himself and his constituent on the one hand and as between himself and the vendees on the other. The Judicial Committee deal with it as if the transaction was in substance one of Agency—the Pakka Adatia having little concern in the rise or fall of the market, as his only right was to a commission and an indemnity against loss, if any should arise out of the forward contracts which he may enter into in pursuance of the employer's directions. From this standpoint it would ordinarily have made no difference (so far as the Indian Contract Act is concerned) whether the forward contracts themselves were meant to be genuine transactions or merely by way of wager; for on the principle of *Read* v. *Anderson* [2] followed in more than one case in India (See *Chekka Venkataswamy* v. *Gajjila Nagabhushanam* [3] and the decisions there cited) the agent's claim against his principal will be good even if the main transaction was void as a wagering contract. It is possible to doubt whether the act of an agent in paying differences or damages in connection with a wagering contract is a 'lawful' act so as to attract the rule of indemnity enacted in S. 222 of the Contract Act; but it will be too much to assume that the Judicial Committee intended to disregard this line of cases on the ground of unsoundness without even so much as a passing reference to them. In the present case their Lordships had probably to decide upon the legality of the main contract, because as pointed out by Sir Lawrence Jenkins

1. (1905) I. L. R. 30 B. 205. 2. (1884) L. R. 13 Q.B. D. 779.
3. (1904) 14 M. L. J. 326.

himself in *Doshi Talakshi* v. *Shah Ujamsi Velsi* [1] the law in Bombay under Bombay Act, III of 1865, is stricter than the Contract Act, and like the English Gaming Act of 1892 avoids even contracts collateral to a wager. But there is no reference to this circumstance in the Judgment. As to their conclusion on the facts of the case, it is true that mere speculation does not necessarily involve a contract by way of wager but when they speak of a common intention to wager, it is not clear whether they mean an intention common to the Pakka Adatia and his employer or one, extending also to the third parties with whom the former enters into dealings under instructions from the latter.

Narsim Bhat Bin Chintamanbhat *v.* Bando Krishna Kulkarni: I. L. R. 42 B. 411.

The view taken in this case, that a Court-auction-purchaser is not a representative of the judgment-debtor seems to us better to accord with the principle recognised by the Judicial Committee as early as in *Anando Majee* v. *Dhonendro Chunder* [2] and reaffirmed in *Dunendro Nath* v. *Ramkumar* [3]. The Calcutta High Court has latterly taken a different view, not merely for the application of S. 244 of the Code of 1882, but even for the purposes of the Law of Estoppel. See *Prayag Raj* v. *Sidhu Prasad* [4]. Some observations on this case will be found in an article in the 19th volume of this Journal at page 329 etc., Seq. As pointed out in *Nadamuni Narayana Iyengar* v. *Veerabhadra Pillai* [5], followed in *Thangavalu Mudaliar* v. *Mahomed Ibrahim Sahib* [6], the bar of a separate suit by virtue of S. 244 may in a certain class of cases arise even independently of the question whether the auction-purchaser is or is not a representative either of the judgment-debtor or of the decree-holder. In the course of Justice Krishnaswami Iyer's judgment, a distinction is suggested between a purchaser in execution of a mortgage-decree and one buying at a sale held in execution of a money decree and the learned Judge thinks that in the former case the purchaser will be a representative of the Judgment-debtor, but not in the latter. With all respect we fail to see the force of the distinction for the present purpose.

1. (1899) I. L. R. 24 Bom 228
2. (1871) 14 M. I. A. 101.
3. (1881) I. L. R 7 C. 107.
4. (1908) I. L. R. 35 Cal. 877.
5. (1910) I L R. 34 Mad. 417.
6. (1916) 3 Law. Weekly. 377.

Muralidhar Chamaria v. Dalmia. I. L. R. 45 C. 818.

The extent of the right of appeal, conferred by cl. 15 of the Letters Patent can in the nature of things never be exactly defined so far as interlocutory orders are concerned and, as has frequently been pointed out, the reported decisions under that head are not all easy to reconcile. The grouping and criticism of most of these decisions in the judgments in *Tuljaram Rao* v. *Alagappa Chettiar* [1] will perhaps furnish a more satisfactory test to judge by than the attempted definition of the word 'judgment' in any single case however elaborate and careful such an attempt may be. The actual decision in the present case seems to us unexceptionable, but in view of the considerations pointed out in Tuljaram Rao's case, we doubt if (as is done in the case under notice) it is right to lay stress on the fact that the judge whose order is sought to be questioned in appeal may, in spite of such order, allow certain things to be done *at his discretion*. Nor does it appear safe to rely upon any parallel or analogy from the Civil Procedure Code, especially the recent codes—whatever may be said in favour of using Act VIII of 1859 as an aid to the interpretation of the Letters Patent.

Elahi Baksh Kazi v. Emperor: I.L.R. 45 C 825.

Though in the view taken by the court on the facts, the question of law or rather legal practice argued in the case did not call for a decision, the strong inclination of opinion expressed by both the learned Judges will probably lead to a fuller discussion of the same at an early date. Except for the judgment of *Miller, J. in Bogra* v. *Emperor* [2], we believe it has hitherto generally been held that a deposition which in the matter of recording, reading over or certifying it, has not been prepared in conformity with the requirements of the procedure Codes is inadmissible as a basis for a charge of perjury. If, as one knows to be the practice, courts of first instance often fail to observe the requirements of law, that would certainly be no reason for the higher courts being lax in applying the law. But while there is little difficulty in realising the importance of the reasons which underlie the several precautions imposed by law in the matter of recording evidence, it is by no means easy to say whether the failure to conform to all or some of them

1. (1910) I. L. R. 35 M. 1. 2. 1910 I. L. R. 34 M 141

(and if so, which) will render the deposition invalid *in law* and thus inadmissible as a record of the witness's statement. Whatever view may be taken upon this point there is however no *legal* reason for drawing a distinction between the use of an irregularly recorded deposition for one purpose and its use for some other purpose, though the gravity of a charge of perjury may justify greater hesitation on the part of a court in acting upon an irregular record of a deposition.

Should the deposition be held inadmissible in certain events or for certain purposes, the question of the exclusion of other evidence in such cases to prove that a witness made a particular statement is one of greater difficulty. The language of S. 91 of the Evidence Act is certainly very wide and when the question was before the Madras High Court in connection with the admissibility of parol evidence as to the contents of a search list, *In re Solai Naick* [1], the learned Judges though they held that the section did not apply to the case, found it far from easy to define the reason for that view and even the considerations there suggested would bring a deposition under S. 91. It is significant in this connection to note that in respect of *confessions* irregularly recorded the legislature has thought fit to make express provision for the admission of oral evidence 'notwithstanding anything contained in S. 91 of the Evidence Act' (See S. 533 of the Criminal Procedure Code and see also *Queen Empress* v. *Raghu* [2], *Queen Empress* v. *Viran, etc.* [3])

Venkatesh Appashet *v.* Abdul Kadir : I. L. R. 42 B. 438.

Judging from the report of the argument, the contention on behalf of the appellants in this case seems to have been rested solely on the ground that the street being a *public* street any member of the public has a right to use it for a procession accompanied by music. According to English notions the learned Judges were probably right in refusing to uphold such a general claim though in *Kandasami* v. *Subbarayah* [4] the Madras High Court took a different view. But the language employed (especially by Heaton, J.) is capable of meaning that *under no circumstances,* as for instance by long user by a particular section of the public or by the authorities of a temple, etc., can such a right be acquired over a public

1. (1910) 21, M. L. J. 281.
2. (1898) I. L. R. 23 B. 221.
3. (1886) I. L. R. 9 M. 224.
4. (1909) I. L. R. 32 M. 478

thoroughfare. This wide proposition could probably not have been in the mind of the Court and at any rate it would require further consideration, especially in a country like India where the notion of 'dedication' as a thoroughfare is comparatively modern and the practice of using thoroughfares for specific processional or ceremonial purposes on specified occasions has so long existed as almost to suggest in many cases that the dedication to the public (if any) must have been subject to such special user (see the different views indicated by the several Judges who took part in *Vijiaraghavachariar* v. *Emperor* [1]). *cf. Valan Pakkiri* v. *Subbayan* [2]. We must however point out that where such ancient usages may be established a further question alluded to by the Judicial Committee in *Sadagopachariar* v. *Krishnamurthi Row* [3], will have also to be considered, *viz.*, the effect thereon of laws like the Muncipalities and District Boards Acts vesting the streets in public corporations.

Chunilal Harilal *v.* Bai Mani. I. L. R. 42 B. 504.

The rules of law relating to the enforceability of a decree for injunction against persons other than the defendant on record are by no means clear and the Code has very little to say about it. As generally happens, it is the possession of some property that entitles one to the benefit of an injunction or subjects another to the burden of one. But it has been held that on a transfer of the property itself, neither the benefit of the injunction nor the burden passes likewise (*cf. Sillu Pedda Yelligadu* v. *Raja* of *Pittapur* [4], *Dahyabhai* v. *Bapulal* [5], and *Jamsetji Manekji* v. *Hari Dayal* [6]. It is difficult to see what useful purpose will be served by allowing the decree to be executed by or against a person who has no longer any interest in the property the possession of which was the reason and the occasion for the injunction being sought. In the case under notice an injunction had been obtained against some members of a joint Hindu family, but the acts thereby restrained were being committed after their death by certain other members who had not been impleaded in the suit. In holding that the injunction cannot be enforced against the latter, the learned Judges lay some stress on the omission to implead them. They meet the argument

1 (1903) I. L. R. 26 M. 554.
2. (1918) 36 M. L. J. 79 F. B.
3. (1907) I. L. R. 30 M. 185.
4. (1915) 29 M. L. J. 693.
5. (1901) I. L. R. 26 B. 140.
6. (1907) I. L. R. 32 B. 181.

based upon Ss 50 and 53 of the Code by saying that in a joint family a son is not the legal representative of his father. On this reasoning a coparcener born or adopted subsequent to the decree cannot be affected by the injunction too. The decision in *Sakarlal* v. *Bai Parvatibai* [1] would however suggest that if a Hindu father leaves self-acquired property which is inherited by his son an injunction obtained against the former can be enforced against the latter and we presume the same rule will apply where a father leaves both self-acquired and ancestral property to be taken by his son. According to the true theory of the Hindu law however the son's succession is by the rule of survivorship as much in the case of the father's self-acquired property as in the case of ancestral property.

S 53 of the code it must be admitted is not perhaps of much use in this connection, as that was meant to meet a special class of cases viz liability for *debts*. As for the definition of "legal representative' the Privy Council in *Venkatanarayana Pillai* v. *Subbammal* [2] went so far as to suggest that the language is capable of being applied to one reversioner claiming to continue an action brought by another and in joint families it frequently happens that a son is brought on as legal representative in the place of his deceased father though the action may relate to ancestral property. The real difficulty seems however to be that it is one thing to hold that one person is represented by another for the purpose of a pending suit so as to entitle him to come into or continue the suit or make the adjudication in the suit binding upon the former, but it is a different thing to enforce against him an injunction granted in the suit. Thus in class actions, while there can be no doubt that the class as a whole will be bound by a decree fairly obtained against those *eo nomine* on the record and it has also been recognised that any member of the class can continue the action when the representative dies or fails to prosecute the action, an injunction against the latter has been held to be un-enforceable against those not actualy brought on the record. (*See Sadagopachari etc.*, v. *Krishnamachari etc.* [3], *Srinivasa Aiyangar* v. *Arayar Srinivasa Aiyangar* [4] and *Sahib Thambi* v. *Hamid* [5]).

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1 (1901) I. L. R. 26 B. 283. 2. (1915) I. L R. 38 M 406 (P.C.)
3. (1889) I. L. R. 12 M. 356. 4. (1910) I. L. R. 33 M. 483.
5. (1911) I. L. R. 36 M 414.

Abdul Razak *v.* **Mahomed Hussein** : I. L. R. 42 B. 499.

The English action for breach of promise of marriage no doubt has certain peculiarities of its own and we quite agree with Justice Kemp that there is no reason for importing them into this country. Our courts have generally refused to follow the English rule as to the measure of damages in actions arising out of contracts to sell or purchase immoveable property and on the same line of reasoning it must be held that all questions of damages for breach of contract must be decided here with reference to S. 73 of the Contract Act. But in so far as the learned Judge holds that a contract by a Mahomedan to give his daughter in marriage to another is a valid contract with reference to which a claim for damages under S. 73 or for restoration or compensation under S. 65 of the Contract Act may be maintained, the matter seems to us not free from doubt. If the reasoning in *Devarayan* v. *Mutturaman*[1] is sound there is no reason why the same considerations should not hold good as much amongst Mahomedans as among Hindus. And there seems to be little difference in this respect between a claim to recover a stipulated amount in default of bringing about the marriage and a claim to recover damages in the like contingency. As for S. 65, the Privy Council have held it to be inapplicable to cases in which the contract is *ab initio* void as a matter of law. But it is remarkable that Illustration (*a*) to that section puts the very case of a promise to give one's daughter in marriage. The contract however is there assumed to be void because of the daughter being dead even at the time of the promise. But the illustration rather suggests that a contract of this kind may be good in law. It is also noteworthy that both in the Hindu and the Mahomedan law books express provision is made for return of presents, ornaments, etc., on failure to perform the marriage.

Ganu *v.* **Bhau** : I. L. R. 42 B. 512.

The facts of this case resembling in all main features those in *Maung Kyin* v. *Ma Shwe La*[2] the learned Judges have given the plaintiff a decree for redemption on the authority of the Judicial Committee's pronouncement. Briefly stated, the position was that A ostensibly sold property to B and some years later B transferred it to C, all parties knowing at the time that B had

1. (1914) I. L. R. 37 M. 393. 2. (1918) I. L. R. 45 C. 320.

in reality only a mortgage interest and that C was in due course to be redeemed by A. As we pointed out when dealing with the above decision of the Privy Council 35 M. L. J. (N. I. C.) 25 their Lordships' Judgment does not deal with the question whether in the face of S. 92 of the Evidence Act, A can be allowed to show that the transaction between himself and B though purporting to be a sale was in reality but a mortgage. This difficulty seems to have been pressed upon the learned Judges of the Bombay High Court in the present case. With all respect, we find it hard to understand the reasoning by which Mr. Justice Shah seeks to get over it. The Privy Council case itself recognises that as between A and B the latter could have maintained that the transaction was a sale and notwithstanding the proviso (1) to S. 92 precluded A from proving that it was intended to be one by way of mortgage. It is then difficult to see how A will stand on a better position as against one claiming by transfer from B. Justice Marten meets the situation by implying an agreement at the date of the later transaction to treat the earlier transaction as a mortgage and to transfer the right as so understood. We are not sure that there is any basis in fact for implying an agreement of this kind and except in circumstances where a novation could be established the agreement even if implied would have no consideration to support it. Even if something resembling a 'Novatio' could be spelt out we do not see how a relationship of mortgagor and mortgagee can *directly* arise between A and C in the absence of a fresh mortgage document; and in so far as it is to rest on the transfer of B's right to C we are unable to see how any agreement between the parties can vary the rules of the law of evidence, so as to enable the court to treat an ostensible sale as a mortgage. If Justice Marten had in mind the principle of proviso (4) to S. 92, we must point out that even that rule is excluded in cases where the earlier contract is by law required to be in writing or has been registered.

Himatlal Maganlal Shah *v.* Bhikabhai Amritalal Shah: I. L. R. 42 B. 529.

The decision in *Hayagreeva* v. *Sami and another* [1] cannot reasonably be construed as supporting the extravagant claim

1. (1891) I. L. R. 15 M 286.

made in the present case. The report of it is rather meagre and if the decision was really meant to give plaintiff a right of entry on defendant's land for the purpose of repairing the projecting portion of the roof of his own house, it will at best amount to a recognition of the convenience of such a course in the circumstances of the particular case. This is very different from restraining the defendant practically from making any use of his land. As for the repair of the wall of the plaintiff's house, we certainly don't see how the existence of a right of discharging eaves' water on the defendant's land will serve to give the plaintiff any special 'accessory' right in connection with the maintenance of the wall. We must however say that we don't quite understand what the learned Judges mean in the present case when they observe that if the outer side of plaintiff's wall required any repair the same may be effected from inside.

Raoji Bhikaji *v.* Anant Laxman : I. L. R. 42 B. 535.

The principal question decided in this case is not likely to arise in this Presidency where the claim of female members to have a share allotted to them at the joint family partition has ceased to be recognised. The text of Yajnavalkya which provides for the allotment of a share to the mother contains no clear indication that her right is different in nature or extent from that of the other sharers. It is really the later development of the law when it came to postulate a right by birth in the male members of the family that has brought about the difference between those entitled to demand a partition and the rest who are merely allowed a share if and when a partition takes place. Even here the distinction between an actual partition and a mere division in status, with the consequent deduction that female members can claim a share only in the former case but not in the latter, rests wholly on judicial pronouncements.

Advi *bin* Fakirappa *v.* Fakirappa : I. L. R. 42 B. 547.

The curious problem considered in this case can arise only in Bombay where the adoption of a person after marriage is permitted (apart from special custom). In *Kalgavda v. Somappa* [1] one member of the present bench (Heaton, J.) sitting with Chandavarkar, J., had decided that on such an adoption, a son who had *already been born* to the adoptee

1. (1909) I L. R. 33 B 669.

remained in the natural family though both his mother and father passed into the adoptive family as a result of the adoption. The question now arose in connection with a child in the mother's womb at the time of his father's adoption and both the learned Judges hold that at his birth he becomes a member of the adoptive family. As was pointed out in the note on *Kalgavada's case* in 20 M. L. J. at p. 63, the Roman Law which recognised a similar adoption treated the child in the womb at the time of the adoption as on the same footing as one born at the time and assigned both alike to the *natural* family. Notwithstanding Justice Chandavarkar's attempt to the contrary in the earlier case, we think the matter has to be decided on general principles and not on any special principles, much less particular texts of the Hindu Law and we see nothing derogatory to the credit or dignity of the Hindu Law in owning that its ancient Law givers have not provided for this curious case. The modern conception that legal rights may inhere in a person even from the date of his conception is distinctly stated in terms in the Smriti Chandrika (Ch. I. pl. 27) though Mr. Sarkar thinks that this ought to be restricted to the case of the son claiming a right by birth in his father's estate. The ancient lawgivers whose theory of 'Dharma' was wider than the stricter notion of 'law' now obtaining, recognised even the claims of 'unborn' generations for certain purposes, besides making express provision for reopening a partition in favour of persons subsequently born. We are however not sure that the learned Judges have adopted a safe legal basis in deciding the present case on the theory of practical convenience that it is more likely to be for the benefit of a child to be regarded as a member of his father's adoptive family than to remain in the natural family and that therefore his legal existence may for the present purpose be held to date from his birth rather than from the time of his conception. If the acquisition of a particular *gotra* by the child is to be regarded as the material factor according to the Smritis, we do not think that the texts assign a gotra to the child in embryo ; at the earliest, the acquisition seems to date from birth only, while there is some warrant for postponing it to the date of Upanayanam in the case of a male and of marriage in the case of a female.

Imambandi v. Mutsaddi: I.L.R. 45 C. 878 P. C.

Apart from the question of the possibility of a different interpretation being put upon the Mahomedan Law texts, the present decision of their Lordships has the merit of laying down a definite rule and perhaps of reducing risk and litigation. Whether the stricter view here taken, *viz.*; that a person other than a legal guardian cannot under *any* circumstances dispose of a ward's immoveable property may not sometimes be detrimental to the interests of minors, is another matter. Their Lordships recognise that a person falling under the convenient designation of 'de facto guardian' may in circumstances of imperative necessity raise money for the benefit of the minor and even pledge the minor's 'goods and chattels' or sell them too. But they hold that no such power is exercisable with regard to the ward's immoveable property. The difference between their Lordships' view and the Judgment of the Madras High Court in *Ayderman Kutti* v. *Syed Ali* [1] lies in this emphasis on the distinction between moveable and immoveable property. That most early systems of law recognised such a distinction for many purposes, admits of no doubt. In the Hindu Law, the difference has been practically obliterated by modern decisions. Whether there is any substantial reason for keeping t up in the Mahomedan Law is open to doubt. We do not however understand the learned Judges of the Madras High Court to lay down broadly that as regards the powers of guardians the Mahomedan Law makes no distinction between moveable and immoveable property. Their observation seems to be restricted to the second of the three cases enumerated by the author of the Hedaya in this connection and the basis on which they rest their opinion makes this clear, *viz.*, that if the justification for the recognition of a transaction entered into by the unauthorised guardian is the imperative necessity that prompted it, there is no reason in the face of such necessity to maintain the distinction between moveable and immoveable property. It seems to us scarcely right to say that according to the Madras case the powers of a *de facto* guardian would, in substance, be the same as those of a lawfully constituted guardian. One difference is stated to rest on the distinction

1. (1912) I. L. R. 37 M 514.

between transactions for profit and those arising out of absolute necessity. But the more important difference seems to be that the *de jure* guardian has power to do certain things whether the ward is actually under his protection or not, whereas the *de facto* guardian is empowered to act only when the minor is in his custody. We must however observe that neither the Madras judgment nor the Privy Council decision makes it clear whether the necessity which may justify any particular disposition of the minor's property by a *de facto* guardian is the *personal* need of the minor such as "his" maintenance or what may be called the necessities of his estate, *e.g.*, payment of Government revenue, etc.

As to sales, etc., by a *Fazuli*, the passages relating to these seem to be relied on in the Madras case only by way of analogy or as containing a general rule of which the case of the *de facto* guardian may be regarded as a corollary.

Incidentally the case also decides an important point which though in one sense a question of procedure is equally one of substantive law. The defendants impugned the title of the plaintiff's alienors and when that was found in plaintiff's favour, the High court seems to have held that it was not necessary in the present action to decide whether as against those alienors the plaintiff had acquired a good title. Their Lordships overrule this view and lay down that though the defendants be trespassers and do not claim under or even recognise the title of the true owner, it is open to them in a suit in ejectment to insist on plaintiff establishing a legal title in himself.

Rajah of Deo *v.* **Abdullah** : I. L. R. 45 C. 909.

This is another of those recent pronouncements of their Lordships which admit of being interpreted as overthrowing the doctrine laid down by the Madras Full Bench in *Kurri Veerareddi's Case* [1]. The Calcutta and Bombay High Courts have shown themselves ready to accept the more liberal view that even in the absence of a registered deed of transfer, a party may be able to sustain his title to immoveable property by reference to the conduct of the person in whom what may be

1. (1906) I. L. R. 29 M. 336.

described as the bare legal title may in a sense still remain vested. The Madras High Court, in spite of doubts and dissents, still adheres to the stricter view founded on the letter of the Transfer of Property Act. (*Cf. Ramanatham* v. *Ranganatham* [1].) In the present case there was as a matter of fact, a registered deed of transfer in favour of the plaintiff's vendor but that had been executed by a person who had not himself acquired a perfect title. The judgment is therefore rested on the ground of estoppel, *viz.*, that the true owner had himself asked the other person to execute the conveyance in question and also consented to the mutation of names in favour of the transferee who relying upon this conduct of the true owner had changed her position, making herself liable to the state for the revenue accruing due on the land. It must be stated that this species of estoppel arising from the liability entailed by the transfer of registry or patta to the name of the purchaser or donee may arise as much on the original invalid or imperfect conveyance as upon the subsequent conduct of the owner in consenting to the transfer of registry and it is not clear whether the Privy Council meant to attach more importance to the one piece of conduct than to the other. Suppose for instance, acting on an unregistered conveyance, the vendee has been paying the revenue on the land in question for a number of years, though there may have been no transfer of registry. There is a change of position as much in this case as in any other. Suppose again, as in the recent Madras case (*Ramanathan* v. *Ranganathan*) the transferee changes his position by spending a large amount of money in building upon the land ; why should that not suffice to enable him to resist an assertion of title by the former owner. There is no particular virtue in the transfer of patta, for the liability thereby incurred may be avoided by abandoning the land, so far at any rate as the future is concerned. We are however not sure if their Lordships did not intend to rely on the fact of the existence of a registered conveyance, the estoppel only operating to the extent of binding the true owner by the act of the person whom he held out as competent to convey. This result may be reached perhaps more easily by the application of the principle of agency, but of this there is no trace in the judgment.

1. (1916) I.L.R. 40 M. 1134=33 M. L. J. 258.

Nilkanth Laxman *v.* Raghu : I. L. R. 42 B. 553.

It is not easy to see that the words 'date of issue' in Art. 182, cl. (6) of the Limitation Act of 1908 indicate a different intention from the expression 'date of issuing' found in the corresponding provision of the Act of 1877. In the one case as much as in the other, we should have thought that on a literal interpretation the words refer to the date on which the notice is actually issued and not to that on which the court orders notice. In view of the desirability of a uniform practice in such matters, we are glad to find the Bombay High Court now coming to take the view all along adopted in Madras and Calcutta. The Allahabad High Court however prefers to adhere to the other view on the ground of *stare decisis*. See *Kalka Bakhsh* v. *Ram Charan* [1].

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1. (1918) I. L. R. 40 A. 630 (F. B.)

Bhiooobai *v.* **Hariba Raghuji,** I. L. R. 42 B. 556.

This case raises several interesting questions incidental to class actions though for one reason or another the decision happens to be confined to one or two. A former suit brought by one member on behalf of a caste was dismissed with costs and another member paid certain sums of money to save the common property of the caste from being sold away in execution for the realisation of the costs and charges of that action. The latter member now sued the caste to recover the moneys thus spent by him for the benefit of the caste. There being admittedly no 'charge' on the property to which the plaintiff might claim to be subrogated, his claim was sought to be based on Ss. 69 and 70 of the Contract Act. The question of the applicability of S. 69 to the case is not decided by the learned Judge but it appears to us there are several obstacles in the way of such application. The section clearly contemplates a difference in situation between the person paying and the person *bound* to pay and does not seem to cover a case in which the person who makes the payment is as much *bound* to do so as the man from whom he seeks to recover it, or (conversely) the latter is as little *bound* to pay as the former. And where the defendant is under no *personal* liability in the matter, but at best only stands to lose his interest in some property held by himself and others in common, the unlimited liability enacted by S. 69 cannot with any reason be imposed on him merely because another person chooses to make that payment and then sue him to recover the amount. (*See Jagapati Raju* v. *Sannamma* [1] and the cases there cited). It is on S. 70 that Marten, J., bases his decision; but with all respect, this too seems to us not beyond doubt. Whether in applying S. 70 one need go the length (as in *Yogambal Boyee* v. *Naina Pillai* [2]) of restricting its scope to that of the rule in England based on *Lampleigh* v. *Brathwaite* [3] is a different matter, but the section postulates some act on the part of the defendant showing enjoyment by him of the benefit of the plaintiff's act (see *Raja of Pittapuram* v. *Secretary of State* [4] followed in *Narain Rai.* v. *Appu* [5] and *Jagapatiraju* v. *Sannama* [1] *supra*). It is to say the least doubtful whether

1. (1916) I L R 39 M 795.
2 (1909) I. L. R. 33 M. 15.
3. 1 Sm. L. C. 160.
4. (1914) 16 M. L. T. 375.
5 (1915) 28 I. C. 456.

an indefinite body like a caste can satisfy the requirements of the section. On the facts of the particular case it would appear that some members of the caste disputed the liability of the caste property to be brought to sale in execution of the former decree for costs but their acquiescence in an adverse order in that proceeding seems scarcely sufficient to make out a case of enjoyment by the caste of the benefit of plaintiff's subsequent payment. Another point on which the learned judge himself felt some difficulty also tends to show the inapplicability of S. 70 to the case. The section does not limit the plaintiff's right or remedy to the particular property saved or benefited by the plaintiff's act. Marten, J. himself felt that S. 70 conferred only a personal right but that the case before him was not one for a 'personal decree' against the members of the caste. Nor could he legally declare a 'charge' on the property. He was no doubt relieved by the undertaking (on behalf of the plaintiff) not to levy execution except against the immoveable property of the caste but that does not get rid of the logical untenability of the position. The learned Judge was really sanctioning a novel kind of salvage lien under the guise of applying S. 70 of the Contract Act.

Discussing the kinds of relief that may be granted in 'representative' actions, Marten, J., comes to the conclusion that a 'personal decree' for money can be passed against a *class* represented by some of its members, though on considerations of fairness, he limited execution of the decree to the caste property. Where funds belonging to such a class are legally vested in a person and such person is before the court, it may be that the court can in a representative action order payment by him out of such fund. Or, if the persons before the court are able to represent the interests of others in specific properties or funds, the decree of the court may bind such interests. But apart from these two classes of cases, it is difficult to see how there can be a decree for money against persons not *eo-nomine* on the record.

The remarks of the learned Judge as to the need for care and caution in drawing up decrees or orders in class actions deserve to be noted, for not merely is there some difficulty in determining the kinds of relief awardable in such proceedings but the direction as to costs, if not properly worded is also

likely to lead to new difficulties. Though reference is made to Lord Justice Fletcher Moulton's dictum in *Market and Co.'s case* [1], Marten, J., does not quite seem prepared to accept the view there indicated, that in class actions, there should be no order for costs except as against the parties on record *Sajedar* v. *Bardya Nath* [2]. Here again we find it hard to understand the learned Judge's view that the action before him was "in effect with reference to the immovable property" of the caste and that therefore he had power to order the costs of the action to be paid out of that property. In an earlier portion of the Judgment, there is a suggestion that a person who by the authority of the caste sues or defends an action on its behalf may on the analogy of Ss. 222 and 223 of the Contract Act, be entitled to an indemnity from the caste in respect of expenses, etc. But assuming this to be so, it does not follow that the court can make an order for or the successful party can have direct recourse against the caste itself for costs not incurred by its representative but found payable to his opponent. If the opponent finds that the representative is not a man of substance he has either to thank himself (where the representative was of his own choice)or he can protect himself by insisting on a better representative coming forward or by demanding security for costs (*e.g.*) *De Hart* v. *Stevenson*. [3] It need scarcely be added that the mere fact that the estoppel created by the judgment may bind the whole class is no reason for making an order for costs against all persons who will be so bound, for, the two kinds of liability do not rest on the same principle and such estoppel may arise even in cases not falling under O. 1 R. 8 C. P. C. (*c.f.*) *Rangamma* v. *Narasimha*. [4]

Incidentally Marten, J. dissents from *Dori Lal* v. *Pattiram* [5] and *Suchand* v. *Balaram* [6] in so far as they hold that on a claim by one person to recover from another money paid by the former to set aside an auction sale of property belonging to the latter or to both, the plaintiff should be given a decree only with reference to the debt actually due and not also in respect of the five per cent. compensation paid under O. 21, R.

1. L. R. (1910) 2 K. B. at p. 1039.
2. (1897) 1 C. W. N. 65.
3. (1875) 1 Q. B. D. 313.
4. (1916) 31 M. L. J. 26.
5. (1911) 8 A. L. J. R 622.
6. (1910) I. L. R. 38 C. 1.

89 C. P. C. If the relief is afforded on a principle analogous to salvage, the learned Judge is right in saying that there is no reason for excluding this latter item, for, except by that additional payment, the sale could not have been set aside. In *Suchand Ghosal's* case where the suit was for contribution Doss, J. excluded this item because his decision rested on the ground of contribution between joint obligors and the five per cent. compensation did not form part of the joint obligation.' Jenkins, C. J., assigns no reason for his conclusion on this point. *Dorilal's* case was also a case of contribution and the Judgment practically follows the Calcutta Decision.

Narasagounda v. Chawagounda, I. L. R. 42 B. 638.

The decision of the Full Bench in this case is in accord with the view generally current as to the proper scope of Art. 91 of the Limitation Act, viz., that it does not apply to a document which it is not necessary to have set aside by a court of law before obtaining relief inconsistent with its tenor. The question arose in connection with a sale-deed executed by a minor which was pleaded in bar of a subsequent suit for possession by him against the vendee and the Full Bench almost wholly base their conclusion on certain decisions of the Privy Council. While we have no hesitation in agreeing with the learned Judges that S. 39 of the Specific Relief Act is only permissive and not obligatory, we cannot help feeling that on the question of limitation, neither *Bijoy Gopal Mukherjee* v. *Krishna Mahishi Deb* [1] nor *Petherpermal Chetty* v. *Muniandi Servai* [2] is strictly parallel to the present case; and the way that the acting Chief Justice seeks to apply *Bijoy Gopal Mukherjee's case* to the question before him brings him into trouble with reference to the decision in *Janki Kunwar* v. *Ajit Singh* [3]. The language used by Lord Atkinson in *Petherpermal Chetty's case* is no doubt such as may be directly applied even to the present question but it is clear that his Lordship was using the word 'inoperative' in connection with an instrument "not intended" to be operative and had not to deal with a document which in spite of the intention of the parties, the law refused to give operation to. The decision in *Maharani Beni Pershad Koeri's case* [4] seems to us, with all respect, beside the point for, their Lordships' judgment proceeded on the footing that the patta there in question had become *spent* and was therefore no longer an obstacle to the plaintiff's claim for possession. One aspect of the question is, does Art. 91 apply only to a suit for cancellation or also to a suit for possession. Kemp, J., answers it by saying that it does not apply where other substantial relief being prayed for, the cancellation of the instrument is either not necessary or is merely auxiliary to the other relief. This only removes the difficulty a step further; but the learned Judge there meets it by holding that it is not necessary for a minor after he attains majority to

1. (1907) I. L. R. 34 C. 329.
2. (1908) I. L. R. 35 C. 551.
3. (1887) I. L. R. 15 C. 58.
4. (1899) L. R. 26 I. A. 216.

sue for cancellation of an instrument which the law has declared to be void *ab initio*. This is however inconsistent with the dictum of the judicial committee in *Velu Pandaram's case* [1] where dealing with the alienation of a religious office which they hold to be *ab initio* void, their Lordships assume that the minor office-holder must have sued (under Art, 44) to set aside the sale. We are not sure that the attempt in *Sidhu Sahu* v. *Gopicharan* [2] and *Narayanan* v. *Lakshmanan* [3] to explain away this assumption has succeeded beyond dispute. The other line of argument is based on *Bijoygopal Mukherjee's case*, the dictum in which related to a voidable or ratifiable transaction. And the acting Chief Justice accordingly does not restrict his view of Art. 91 to 'void' instruments but only treats them as an *fortiori* case. Taking this larger ground, he was pressed with the decision in *Jankikunwar's case* which he gets over by holding that the suit there was not one for possession and the judgment really proceeded on the facts, the document being held to be not even voidable. We must however point out that this interpretation of the judicial committee's pronouncement is opposed to the clear language of the judgment and was not accepted by the Madras High Court in *Raja Rajeswara Dorai* v. *Arunachellam Chettiar* [4] where Miller and Sadasiva Iyer, JJ., treated it as laying down that a voidable instrument must be avoided by suit within the period allowed by Art. 91 and that after the lapse of such time a claim for possession inconsistent with the deed could not be maintained.

Looking at the question from one point of view, there is much to be said in favour of Mr. Justice Beaman's view in his referring judgment, that no distinction ought to be made for the present purpose between void and voidable deeds, for where the inoperativeness of a deed depends upon proof of facts there is as much reason for requiring such questions to be raised and decided within a short period of the date of the transaction as in the case of facts which render a transaction *voidable*. But this is not the only standard to go by and many articles in the Limitation Act, particularly Art. 141, cannot be reconciled with this theory. Nor, if that test is to be uniformly applied, can any exception be made in favour of *benami*

1. (1899) I. L. R. 23 M 271.
2. (1913) 17 C. L. J. 283.
3. (1915) I. L. R. 39 M. 456.
4. (1913) I. L. R. 38 M. 321.

documents (as in *Petherpermal Chetti's case*) for the decision as to the *benami* character of the document would also depend on proof of facts and circumstances not often free from complexity. The main reasoning of Mr. Justice Beaman's referring order rests on the analogy of Arts. 118 and 119 and is to that extent vitiated by the fact that all the High Courts except Bombay have now come to hold that these Articles do not apply to suits for possession.

Emperor *v.* Maha Ram : I. L. R. 40 A. 393.

Two interesting points under the Indian Christian Marriage Act are discussed in the judgments in this case. First, is a person baptised while an infant, a Christian, within the meaning of S. 68, *i e.*, to say a person professing the Christian religion though he does not conform to the requirements of Christian religion and in fact marries a non-Christian with non-Christian ceremonies after performing a non-Christian ceremony ? Mr. Justice Knox, we think rightly, is of opinion, that such a person cannot be called a person professing the Christian religion. Whatever doubts there might be as regards the professions of a child who has no independent volition in the matter (the question in such a case might perhaps depend on the religious education given or the religious atmosphere in which the child lives) is a matter entirely dependent on his volition the religion of a majoi and on the principles enunciated in *Chetti* v. *Chetti* [1] there is no reason why the very performance of the marriage attended by ceremonies repugnant to Christianity should not be regarded as an act involving the renunication of Christianity by the party. In this case, the party's previous conduct also showed that he did not adhere to the forms and creeds of Christianity. Mr. Justice Walsh bases his judgment acquitting the accused (the priest that officiated at the marriage ceremony) on the ground that S. 68 does not apply to a case other than *Christian marriage.* A non-Christian form of marriage is not according to him within the mischief of the section. In this he agrees with Napier, J in the Order of Reference to the Full Bench in *In re Kolandaivelu and another* [2]. There is much to be said in favour of the view of Mr. Justice Walsh. It could not be, as he points out, that the Legislature intended to punish the parties to the

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1. (1909) P. 67.

2. (1917) I. L R. 40 M. 1030.

marriage as abettors when it has not prohibited the marriages themselves by any penalty. The intention of the Act seems to be merely to prohibit unauthorised solemnisation of Christian marriages.

Het Ram v. Shadi Ram : I. L. R. 40 A. 407 P. C.

Though the points decided in this case are simple enough the significance of the judgment it is difficult to guage exactly. A first mortgagee brought a suit for sale without making the second mortgagee a party. The owner of the equity of redemption got an assignment of the decree but failed to execute the decree and allowed the decree to get barred. In a suit for sale by the second mortgagee the owner of the equity of redemption contended that he was entitled to be paid the amount of the earlier mortgage. Their Lordships say, no. The reason given is that the mortgage security as such is extinguished under S. 89, Transfer of Property Act, and the decree being barred, the first mortgagee had no enforceable claim. Whether the ratio of their Lordships' judgment is that, though the second mortgagee is not a party to and not bound by the decree, it is open to him to contend that the mortgage security is extinguished by reason of an order for sale or whether the decree being barred by limitation as against the mortgagor it was equally unenforceable against the second mortgagee is not clear. Having regard to the earlier cases, it is perhaps better to assume that the latter is the effect of the judgment. The fact that the mortgagee's interest had coalesced with that of the mortgagor could not affect the running of limitation, see *Soni Ram's case.* Another point that is apparently decided by their Lordships is that registration of a second mortgage is notice to the first mortgagee of the existence of such mortgage. It is his duty to look up the books kept in the registration office and satisfy himself that there is no person having any interest in the property whom he is bound to make a party to his suit.

Muhammad Farzand *v.* Rahasat Ali I. L R. 40 A. 381.

An application for leave to appeal in *forma pauperis* has two aspects : In one aspect, it is an application for leave and in another it is an appeal memorandum. When the leave is refused, the memorandum of appeal is still there before the court and has to be disposed of. The proper mode of disposal is to call upon the party to pay the requisite court-fee. See *Nellevadivu Ammal* v. *Subrahmaniya Pillai* [1], *Bai Ful* v. *Desai Manorbhai*. [2] This has been recognized as the correct practice since *Skinner* v. *Orde*. [3]

Bhava *v.* Suman Singh : I. L. R. 40 All. 384.

The right of the reversioner is a mere *spes successionis* and can in no sense be regarded as a right or interest in immoveable property within the meaning of either the Transfer of Property Act or the Registration Act. *Abdul Hoossein Mulla* v. *Goolam Hussein Ally* [4] In addition this was a case in which there was only an agreement not to prosecute a claim which does not amount to a release and does not require registration see *Andalamal* v. *Rukmani Ammal*. [5]

Rama Baran Rai *v.* Har Sewak Dube : I. L. R. 40 A. 387.

Except that in this case the action was a redemption action, the point decided was covered by the decision of the Privy Council in *Norender Narain Singh* v. *Dwarka Lal* [6], In *Forbes* v. *Ameersoonissa* [7] their Lordships held that the function of the Judge in a foreclosure proceeding under S. 8 of Regulation XVII of 1806 was of a ministerial nature. Having regard to the valuable rights dependent on the fact of due service, their Lordships held in *Norender Narain's case*[6] that the Judge's conclusion as to due service was not even be *prima facie* evidence of proper service. There must a limit to the application of the presumption that official acts have been regularly done.

1. (1916) 40 M. 687.
2. (1898) I. L. R. 22 Bom. 849.
3. (1879) 2 All. 241.
4. (1905) I. L. R. 30 B 304.
5. (1904) 15 M. L. J. 370.
6. (1877) I. L. R. 3 Cal. 387.
7. (1865) 10 M. I. A. 340.

Chunnilal v. Narasingh Das : I. L. R. 40 All. 341 (F. B.)

In this case a full Bench of 5 Judges of the Allahabad High Court hold that a person presenting a petition to a criminal court is not liable in a civil suit for damages in respect of statements made therein which may be defamatory of the person complained against. This brings the Allahabad High Court in line with the Madras and Bombay High Courts. It was argued in the case that the Legislature had disclosed its view as to what was just and proper by providing for a qualified privilege in the Penal Code and the Courts in India ought to guide themselves by that rather than the English law. Their Lordships were not prepared to accept this view. Even before the Penal Code there was the law of defamation in India which was based on the English law, and it could not be held that this law was repealed by implication by the Penal Code.

Sri Pat Narain Rai v. Tirbend Missa : I. L. R. 40 All. 423.

If there is a decree which the court is competent to pass it may be that its validity cannot be questioned in execution but where the decree is against a dead man, thedecree is wholly without jurisdiction and may be questioned. In a stronger case, where a minor was a party to the suit but was not properly represented, their Lordships of the Privy Council held that the decree was a nullity. They went further and held that the minor could not be regarded as a party so as to bring his objection within S. 47, C. P. C. *Rashidunissa* v. *Mahomed Ismail Khan.* [1] The objection in this case may not be one within S. 47 though there is no legal obstacle to its being urged in execution.

Collector of Morade bad v. Maqbul-ul-Rahman :—I. L. R. 40 All. 434.

As regards certain of the sections such as S. 19, 21, 34 and 36 we have the authority of the Privy Council that failure to comply with them is an irregularity curable under S. 87. See *Sah Mukhum Lal* v. *Sah Khundam Lal.* [2] We have equally the authority of the Privy Council that any defect in the authority of the person presenting is not cured by S. 87. See

1. (1875) 2 I. A. 216.=15 B. L. R. 228. 2. (1901) I L R. 31 All. 572.

Mujib-un-nissa v. *Abdur Rahim* [1] *Jambu Prasad* v. *Muhammad Aftal Ali Khan.* [2] The circumstance that a person is in fact an agent does not make the defect curable under S. 87 if he has not a power of attorney of the kind required by S. 33. If due presentation within the meaning of S. 75 is presentation in such manner, in such place and by such person as is mentioned in S. 32 and S. 33 (one fails to see why it should be otherwise) the Privy Council rulings above referred to would be fatal to any defective presentation. But the Allahabad High Court makes a distinction between presentation under S. 32 and that under S. 75 and holds that a presentation by a *defacto* agent or by a person authorised, but presenting in an informal manner is a good presentation in the latter case—see 34 All. 253. The reasoning on which the conclusion is based is that there is in cases like these a valid presentation in the first instance and subsequent defects are only defects in procedure and not jurisdictional defects. But this line of reasoning ignores, first that S. 32 is general and secondly that there really is an interruption and it is only by a fresh "due" presentation that the sub-Registrar gets jurisdiction to deal with the matter. If the distinction sought to be made is not sound, arguments based on S. 88 would not avail for the defects that were held incurable *in Jambu Prasad* v. *Muhmad Aftal Ali Khan* [2] were not of very much less technical character.

Rajindra Bahadur Singh v. **Raghubans Kunevar,** I. L. R. 40 A 470 P. C.

The Crown has, having regard to the Crown Grants act, power to vary the rules of succession in respect of any grant made by it but it is not open to any private person to do so. Aa a corollary therefrom their Lordships lay down that it is not open to any individual by any conduct or volition on his part to impart to property not so granted the character of the property granted by the Crown. If there has been any exchange of any portion of the lands so granted for other lands of the Government their Lordships are prepared presume that the tenure on which the new land is held is the same as the old but even there the reason seems to be the fact that the Crown is the *grantor.* If the exchange is with somebody

1. (1900) I L R. 23 A. 233 P. C.   2. (1914) I. L. R. 37 A. 49.

else, the same presumption would not apparently be made or be possible. The line of reasoning herein adopted may affect the doctrine of incorporation applied in some cases to properties acquried out of the income of impartible properties. Incorporation with joint family property stands on quite a different footing. There it is not beyond the power of any individual member to impart the character of joint family property to his self-acquired property. He can transfer it to the family and incorporation in such a case is only a recognised mode of transfer. In a more recent case where the question was whether land given by the Government in exchange for a portion of a settled estate was also a settled estate their Lordships declined to make a presumption in favour of its so becoming but insisted on a formal sanad or other record *Parthasarathi* v. *Raja Bommadevara Satyanarayana* [1],

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Kanhai Lal *v.* **Brig Lal** : I. L. R. 40 A. 487 P. C.

In this case a person put forward his claim as adopted son and there was a compromise and he got certain substantial benefits thereunder. Their Lordships hold that in those circumstances it is not open to him to set up his rights as a reversioner inconsistently with and so as to defeat the compromise when his reversion fell in.

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1. (1918) 36 M. L. J. 279.

Deokinandan v. Gapua: I. L. R. 40 A. 512.

There are two ways of looking at the question. The suit may be viewed as one to "enforce payment of money charged on moveable property" to adapt the language of Art. 132 to the case of hypothecation of moveables in which case in the absence of any special article like Art. 132, the appropriate article would be Art. 57. But if the action is viewed as an action to realise the hypothecation *interest* in moveable property, it would be a case unprovided for and Art. 120 would be the article applicable. The latter view recommended itself to the Full Bench in *Mahalinga Nadar* v. *Ganapathi Subbien* [1]. *Yellappa* v. *Desayappa* [2] is not opposed to this view as there the action was for the balance after realising the pledge. As pointed out in *Mahalinga Nadar* v. *Ganapathi Subbien* [1] suits for sale of hypothecated immoveable property were regarded as actions to enforce an interest in immoveable property and not merely as actions for money lent though the Act of 1877 adopts the curious language above referred to designate that kind of action.

Anandi Kunwar v. Ram Niranjan Das: I. L. R. 40 A. 505.

The view taken in this case accords with that taken in the Full Bench in *Krishnasami* v. *Somasundaram* [3]. The judgment-debtor does not seem to have been party; so that the doubts entertained of the correctness of that case in 39 M. 602 had no application to this case.

Gobardhan v. Munna Lal: I. L. R. 40 All. 584.

Any question of estoppel arising from the fact that the mortgagee had accepted a mortgage of the property apart the decision seems to be right. It is not open in a mortgage suit to raise questions as to paramount title (*Mussamat Radha Kunwar* v. *Thakur Reoti Singh* [4]), though if the suit proceeds to trial, S. 99 C. P. C. prevents the ground from being available in appeal. Under the circumstances, it was impossible to regard a paramount title as a question "that might and ought to have been raised" or to regard the parties as *litigating* under the same title within the meaning of S. 11, C.P.C.

1. (1902) I. L. R. 27 Mad. 528.
2. (1915) I. L. R. 38 B. 621.
3. (1907) I. L. R. 30 M. 335.
4. (1916) 31 M. L. J. 571 (P. C.)

Hingu Singh *v.* **Jhuri Singh**: I. L. R. 40 All. 590.

Where a party engages a pleader and the latter fails to appear, does the mere presence of the party make the disposal of the suit a disposal not for default of appearance but on the merits? *Gopala Rao* v. *Maria Susaiya Pillai* [1], takes a liberal view and holds that even in such a case. there is a default of appearance. See also *Laej Lata* v. *Lachminarayan* [2]. When the rules provide that a party cannot be heard if he has engaged a pleader it would undoubtedly be a default of appearance; should the absence of such a rule make a difference?

Sajjar Begam *v* **Dilawar Husain**: I. L. R. 40 A. 579.

The courts seem to be fairly agreed that the Court has no power under S. 148 to extend the time fixed by a decree to do any act. See *Moideen Kuppai* v. *Ponnusamy Pillai* [3], *Suranjan Singh* v. *Ram Bahal Lal* [4], *Het Singh* v. *Tikaram* [5], *Parmanand Das* v. *Kripa Sindhu* [6]. The suggestion is that S. 114 may apply to such a case. If the application for extension is made on any fraud existing at the date of the decree, the suggestion would be valid but a review would certainly be inadmissible if the ground urged is a supervenien-tone. See I.L.R. 24 M. 1 P.C.

Surajkhan *v.* **Hashmi Begam**: I. L. R. 40 A. 555.

A payment by a person *bona fide* claiming interest though not in fact interested has been held to come within S. 69 and if not within S. 69 at the least within S. 70. *pace Yogambal* v. *Naina Pillai*, [7], but no case has gone so far as to hold a payment. not necessitated by the protection of any interest by the party and not made for any other tangible reason binding. The payment in this case was a voluntary payment pure and simple. The mortgage was not on the property purchased and the purchaser had no interest whatever in discharging the mortgage.

Ram Dulari *v.* **Hardwari Lal**: I. L. R. 40 All. 605.

Both the question, *viz.*, that a covenant for title is broken at the date of the sale, and that a covenant for indemnity

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1 (1906) I. L. L. 30 M. 274. 2. (1918) 3. Pat. L. J. 366.
3 (1914) 1 L. W 882. 4. (1913) I. L. R. 35 A. 582.
5. (1912) I. L. R. 34 A. 388. 6. (1909) I. L. R. 37 C. 548.
7. (1909) I. L. R. 33 M 15.

is broken on damnification, are settled beyond dispute the only question being whether in any particular case the covenant is a covenant for title or a covenant of indemnity. In this case the covenant was that the vendor would make good any excess amount charged against the vendee. On the view that the clause was an indemnity clause Art. 83 applied and the document being a registered one, Art. 116 the starting point being the date of damnification, cf. I. L. R. 44 C 759 P. C.

Jhunku Lal *v.* Bisheshar Das : I. L. R. 40 A 612.

Whether the "other sufficient cause" in O. 23, R. 1, is to be a cause *ejusdem generis* with formal defects has been a matter on which courts are divided. *Kannusami* v. *Jagathambal* [1]. The decision of their Lordships of the Privy Council in *Hussein* v. *Haji Abdulla* [2] would seem to justify the more liberal view. The observations in *Watson* v. *Collector of Rajashaye* [3] were with reference to the old practice and are not with reference to the general words of order O. 23, R. 1. It must nevertheless be confessed that the authority seems to preponderate in favour of the narrower view.

Swaminatha Ayyar *v.* Govindaswami Padayachi : I. L. R. 41 M. 733 (F. B.)

"Estate paying revenue to Government" in connection with S. 265, C. P. C. of 1882 and S. 225 of Act VIII of 1859 have been held to apply only to permanently settled estates. But it is clear from the opinion of the Full Bench in *Muttuchidambara* v. *Karuppa* [4] that if the matter were *res integra,* the Full Bench may not have come to that conclusion. Regulation XXVI of 1802 has always been considered as applicable to ryotwari proprietors though it purports to deal with estates paying revenue to Government. Regulation V of 1804 refers to properties charged with the direct payment of rents or revenues to Government which ryotwari property undoubtedly is. Beyond the words *estate* and the assumption that the estates coming within the Act must be those capable of being taken charge of by the Court of Wards, there is nothing that can be appealed to as supporting the limited construction. We think the conclusion of their Lordships is the correct

1. (1918) I. L. R. 41 M. 701. 2. (1876) I. L. R. 2 C. 131 P. C.
3. (1869) 13 M. I. A. 160. 4. (1884) I. L. R. M. 7 382.

conclusion. The other point decided is that except in cases covered by S. 3 of Regulation XXVI of 1802, *viz.*, transfers *inter vivos*, it is the duty of the Government to maintain proper registry and wrong registration does not entitle the Government to treat the person registered as the proprietor and bring to sale the property after notice to him. This view is not a novel one but had been propounded in *Secretary of State* v. *Ashtamurthi* [1]. Another point that was referred was as to whether S. 59 of the Revenue Recovery Act would apply to cases where the sale is void; as in the view of their Lordships the operation of S. 59 of the Act was excluded by the express reservation in favour of Regulation 10 of 1831 in the Act it became unnecessary to express an opinion on that point.

Kadiravelu Nainar *v.* **Kuppusami Naiker**: I. L. R. 41 M. 743 (F. B.)

The Full Bench has now held that a judgment is not impeachable on the ground that it was obtained by perjured evidence. On this question, even English Judicial opinion is divided though the balance of authority is distinctly in favour of the opposite view. Though we do not agree that the people in India are specially susceptible to the litigation mania and any departure from settled principles is needed by way of preventive to redress this national defect, we do think that the view taken is the better view on the whole.

Venkataratnam *v.* **Ranga Nayakamma**: I. L. R. 41 M. 985 (F. B.)

Where the Court declines to make an investigation into the claim of a person objecting to an attachment whether there is an order such as is contemplated by O. 21, R. 63 so as to require the party against whom the order is made, to set it aside within a year was a question on which courts were very much divided. As pointed out by the Full Bench, the language of the present Code materially differs from the language of the old Code and is not wholly inapt to cover the case. We wonder why the legislature could not express itself better if the change was really intended. It is to be noted that no corresponding change has been made in O. 21, R. 103.

1. (1889) I. L. R. 13 M. 89.

Sundaram Ayyangar v. Ramaswamy Ayyangar, I. L. R. 41 M. 955.

The view taken in this case as to the power of the Board of Revenue to control the act of the Collector is in accordance with the view taken in *Subba Rao* v. *Rama Rao* [1]. We do not quite understand the ground on which S. 5 of Regulation I of 1803 is held applicable. That section has reference to the exercise of statutory powers (see *Sappani Asari* v. *The Collector of Coimbatore* [2].) The distinction made is sound only as regards S. 5 of Regulation I of 1803. But this must be said in favour of the construction adopted in the case that the control referred to in S. 5 of Regulation I of 1803 is only with reference to the executive administration of the revenue. Setting aside the sale cannot be said to relate to executive administration of revenue. If the order of the Board is without jurisdiction its act is outside the statute As such S. 59 cannot apply to the suit. Execution of the order of the Board of Revenue cannot as rightly held, be regarded as an act of the Collector (*Sappani Asari* v. *Collector of Coimbatore* [2]), assuming he could re-view his order which he cannot (see *David Nadar* v. *Manika Vachaka* [3]. Even in the view that the order is one passed in review, if it was *ultra vires*, the case would not come within S. 59 of the Revenue Recovery Act.

Suryanarayana v. **Patanna** : I. L. R. 41 M. 1012. (P. C.)

In this case their Lordships repel the presumption that used to be made that an inam grant is only a grant of the Crown's share in the land. Their Lordships say that there is no such presumption. It is a question of evidence in each case. Where the grant is by the British Government the presumption is no doubt that the grant is only of the rights of the Government that is—subject to the cultivator's right if any. Much may be said against the historical assumptions involved in their Lordships' judgment but from a lawyer's point of view, the only point of view that need detain us, the discussion is wholly unprofitable. We welcome the change in one sense. This presumption though to some extent just had grown into a fetish so as to disturb and unsettle long established titles. The Courts

1. (1913) 25 M. L. J. 155.
2. (1903) I. L R 26 M. 742.
3. (1909) I L. R. 33 M. 65.

till recently as well as the legislature recognised that caution was required in applying the presumption and the application without qualification of the presumption has led to its total rejection, a result equally to be regretted.

Raghavacharyulu v. Govindasari : I. L. R. 41 M. 1068.

The principle of the majority overriding the minority does not apply outside public trusts and their Lordships rightly held that a lease by the majority could not bind the minority among the co-owners. Unless the lease comprised the entire property, the decree passed was the right one as it is not open to one co-sharer to compel the other co-sharers to submit to a partial partition. In this matter there is no difference between a Hindu family and an ordinary tenancy-in-common. If the property comprised the entire property held in common, then, undoubtedly, the right of the other co-sharers would be only to sue for partition or to ask for joint possession. Would a further exception not be required, that is, when one co-sharer gives a lease of the land for the customary period without objection by the others at the time but without their express consent, if the latter object later, is not their only remedy to sue for partition ? But such was not the case here.

Ammani Amma v. Padmanabha Menon : I. L. R. 41 M. 1075.

Possession of private means is not a ground for disallowing maintenance though perhaps the amount of it might be affected by that fact when tarwad means are not sufficient to provide adequate maintenance to all. A claim on the husband or the father for maintenance cannot stand on a higher footing than possession of private means. As rightly pointed out by their Lordships in this case maintenance is not a proper designation for the right of the individual member. In fact it is the mode of enjoyment of his proprietary right by the individual member.

Koti Reddi v. Subbiah : I. L. R. 41 M. 792. (F. B.)

The words in S. 80. Civil Procedure Code, that fell to be construed in this case were " in respect of any act purporting to be done by such public officer in his official capacity." We think, as Mr. Justice Sadasiva Iyer rightly points out that the effect of these words is not the same as if they were "in respect of any act which a public officer purports to do in his official capacity." The act itself must *purport* to be done in the official capacity. The intention must be there to make the act seem an *official act* and the act must also seem an official act. The acts may fall within the following categories.

(i) The act may be one falling within the range of his official duties though the facts, in the particular case, might not justify the act. The action might have been malicious or *bona-fide;*

(ii) The act may not be one falling within the range of his official duties though the officer believed in good faith that it did.

(iii) The act may not fall within the range of his official duties though the officer purports to act as such officer and claims authority to do the act with no authority thereto really, acting maliciously or without any foundation for the belief.

We agree that in cases falling within class (i), the question of malice is immaterial. On the facts, apparently, the particular case under consideration fell within class (i).

We equally think that in class (iii) (that is the opinion of Mr. Justice Sadasiva Aiyar also) he would not be entitled to notice for in that case, his act cannot be said to " *purport* to be done in his *official* capacity" *i e.*, to say it does not have the appearance of an official act capable of being done by him. Though we think that strictly speaking cases even within clause (ii) should not require notice, in deference to the course of English decisions, it is permissible to understand the words as covering such cases. Malice as such is not of importance but the facts that lead to that inference in relation or in juxta position to the act may detract from its semblance to an official act. Only to this extent we think malice is material in the determination of the question as to the necessity for notice. The question under the section is one merely as to the *ostensible chaarcter of the act.* The ostensible character is determined

not solely by the declaration of the doer of the act but by his declaration taken along with the other circumstances. Where the declared *official character* of the act is negatived by the surrounding circumstances, the ostensible character even of the act is its real character and not its declared character.

Madan Mohan Ananga Bheema Deo *v.* Purushottamen Ananga Bheema Rao : I. L. R. 41 M. 855 (P. C.)

The express point decided by their Lordships in this case is that where a person has given his widow authority to make successive adoptions and the latter makes an adoption and the adopted son dies leaving a widow after attaining full legal capacity to continue the line either by begetting a natural born son or by giving her power to adopt, the authority is at an end.

The full significance of this decision is not clear. Later on in the judgment their Lordships say that all that is necessary is that he should have attained full legal capacity to continue the line. The effect of this later statement would seem to be that he need not be married. It is apparently sufficient if he has attained the legal discretion necessary to take a person in adoption. The fact that he dies unmarried and the property vests in his mother would be immaterial. Their Lordships make concurrent power of adoption the crucial test. Once the son attains the power to continue the line, the power of the mother is at an end. Whether capacity to beget a child need enter into the discussion at all is not clear. If legal capacity to adopt is only the age of majority under the Hindu Law as decided in a case in Madras, legal capacity to confer power to adopt cannot stand on a different footing and it is just possible that natural capacity to beget is attained earlier? Supposing the son is married but has not attained the legal capacity either to beget a child or to confer an authority to adopt, would that make a difference ? If the property vests in the widow of the son, Bhooben *Moyee's* case might come in and put an end to the power of the mother. If, it so happens that the propery does not vest either in the mother-in-law or in the daughter-in-law would in those circumstances the authority survive or should the fact that in this part of India, it is open to the sapindas to make up for the want of husband's authority, make a difference ?

Manavikrama Tirmalpad *v.* The Collector of the Nilgiris: I. L. R. 41 M. 943.

On the question as to whether the judgment of the High Court in a Land Acquisition Appeal could be regarded as *judgment* within the meaning of clause 15 of the Letters Patent, it was impossible to get over the clear decision of the Privy Council in *Rangoon Botatoung Company Ltd.* v. *The Collector, Rangoon* [1] and *Special Officers, Salsette Building Sites* v. *Dasabhai Bezanji* [2], and however incovenient the consequences of such a view. The other interesting question of practice discussed in the case is undoubtedly more difficult to answer. That is to say, if two Judges forming the Bench from the lower court differ from each other, but both are for varying the judgment whether S. 98 applies at all to such a case, if it does what the conclusion is to be or whether Art. 36 of the Letters Patent should apply and the judgment of the senior Judge is to prevail. If S. 98 did not apply, Art. 36 of the Letters Patent would apply, See *Bapu* v. *Bapu* [3]. But having regard to the language of S. 54 of the Land Acquisition Act, "Subject to the provisions of the Code of Civil Procedure applicable, to appeals from original decrees an appeal shall lie etc.," we think that S. 98 should apply to Land Acquisition Appeals as well, though the final conclusion may not be appropriately describable as a judgment. But even so, we do not quite see why to the extent the Judges agree in the conclusion, there should not be a modification. If the construction adopted by the majority is sound though both the Judges are for reversing the whole decree if they differ in the grounds for reversing, the Judgment of the Lower Court should be affirmed. If they differ in their reasoning on any of the smallest points the lower Court's decree should be confirmed. Their Lordships are opposed even to the recognition of partial confirmation where the subject-matter of the decree is separable. There is no denying that a strictly literal reading of clause (2) of the section may lead to this conclusion. The section says "where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed judgment is defined as the statement given by the Judge of the grounds of decree or

1. (1912) I L R 40 C. 21 P C 2. (1913) 17 C. W. N 421 P C
3. (1911) I L R. 39 M. 750 F. B.

order. Reading the two provisions together, where there is no such majority which concurs in the statement given by the Judges of the grounds of the decree, the decree of the Lower Court should be affirmed. But, even accepting the literal reading, we think it is possible to hold that to the extent the Judges agree as to the grounds of the decree and in so far as such grounds affect the decree, there is a concurrence and reversal *pro tanto* may properly result. But is not the construction of clause (2) controlled by clause (1)? According to clause (1) the appeal should be decided in accordance with the opinion of the Judges or the majority. Is *opinion* all the grounds? Is it not rather the conclusion which leads to the decree? The word judgment in clause 2 notwithstanding the definition in Sec. 2 may well be restricted to the *opinion* portion referred to in clause (i) and variation to the extent the Judges agree may be given effect to. We think convenience is in favour of this view or a difference even as to costs should lead to the affirmance of the decree of the lower court and parties must be driven to appeal against the whole decree. If variation *protanto* is recognised, where variation is small the parties may not appeal at all or even if they do, the appeal may in most cases be confined to a very narrow compass. On the other hand no doubt it may be urged that the court of appeal may be embarassed by the partial reversal. But does not order 41 and 33 give ample powers to meet the contingency?

Veerabasavaraju *v.* **Balasurya Prasad Rao** : I. L. R. 41 M. 998 P. C

Their Lordships make it clear in this case that though as betweeen reversioners of the same grade, the unreasonable refusal of consent by one may be disregarded and an adoption may be made with the consent of the majority, the refusal, even unreasonable of the reversioner of the nearest grade cannot be made up by the consent of the remoter reversioners.

Abudhunimsa *v.* **Mahammad Fathiuddin** : I. L. R. 41 M. 1026.

S. 2 of the Indian Majority Act is as follows :—Nothing herein contained shall affect the capacity of any person to act in the following matters—marriage, dower, divorceand adoption. If the wider meaning contended for was intended, it was unnecessary to have mentioned marriage, divorce and dower separately. Dower is an incident of marriage, and divorce is putting an end to the marriage. Both these matters relate to marriage. In *Puyikuth Ihayti* v. *Kairhirapokil Mamod* [1], it was held that this section does not enable a Mahomedan minor to sue by herself in respect of her dower. It cannot be doubted however that capacity to act in adoption includes capacity to give authority to adopt.

Munnavaru Begam *v.* **Mir Mahapalli Saheb** : I. L. R. 41 M. 1033.

In this case we have an elaborate exposition as to the capacity of women to succeed to religious offices under the Mahomedan Law. The same principles in fact govern the Hindu as well as Mahomedan religious offices. If the woman is incompetent to perform the office herself or by deputy, either by reason of religious disqualification or by reason of usage, then she is excluded, not otherwise. In the particular case, the office was called Mujavar. Though it originally meant sweeper, in this Presidency the term as pointed out by Mr. Justice Abdur Rahim means ordinarily only mutwali. It involved no special duties of initiation such as preclude a woman from being Sajjanadashin. It is interesting to note that according to the principles of sufism there is nothing to prevent a woman from imparting or receiving instruction. Sufis are like the byragis with whom also there is no distinction based on sex. In fact in the case of byragis, a woman can be the head of a mutt even See *Dhuncooverbai* v. *The Advocate General* [2]. The same seems to be the case with respect to agama and tantra Dikshas though it is not usual to find a woman occupying the headship of a mutt or discharging the duties of a religious office. Ordinarily, more by usage than by any religions disqualification

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1. (1881) I. L. R. 3 M. 248.
2. (1899) 1 Bom. L. R. 743.

and by reason of inconvenience, the rule is that women do not become Sajjadanashins. Mr. Justice Abdur Rahim makes a further statement that under the Mahomedan Law, *per se* sex is not a disqualification for holding any religious office. It is, as in the case of Sajjadanashins, a usage based on inconvenience. If the usage of the institution was perfectly clear, it may be a compromise varying the mode of succession to the office is illegal but where the point is not clear, there is no reason why a compromise should not be upheld see *Nilakandan* v. *Padmanabha* [1].

Ramiah Aiyar *v.* Gopalier : I. L. R. 41 M. 1053.

The principle adopted by the Civil Procedure with respect to the creditor's remedies against the debtor's estate is equality. The fact of attachment gives him no charge or priority of any kind whatever. The analogies of English law with its writs of varying character giving more or less a charge on the debtor's estate and rules providing for charging orders, etc., are not safe to rely on. In the rule in question, there is no clear indication of the intention to confer a charge. The getting of a decree and actual attachment in process of execution or even payment of money into Court to raise an attachment or to prevent an arrest will not give under the Indian law a priority.

In the absence of clear words, we think it is not right to to give a personal creditor a charge and a priority to the detriment of other creditors. There is no power anywhere else in the code giving the Court power to make a charging order in advance of the decree. Even by the decree, the Court can give a charge only in respect of costs. After a decree, there are certain provisions giving power to the Court to order security, *e.g.*, when setting aside an *exparte* decree or staying execution.

Vitta Tayaramma *v.* Chatakondu Sivayya: I. L. R. 41 M. 1078 (F. B.)

In this case a Hindu widow who had succeeded to the property of her husband became a Mahomedan and subsequently married and the question was whether she forfeited her

1 (1890) I. L. R. 14 M. 153.

widow's estate under the Hindu Law. Two questions were discusssed in connection with this matter first whether S. 2 of the Hindu Marriage Act applied so as to divest the estate; secondly if it did not, whether there was any general provision of Hindu Law which divested the estate The learned Chief Justice was of opinion agreeing with the Full Benches of Calcutta and Bombay that S. 2 applied to the case while the majority (Oldfield and Seshagiri Aiyar, JJ.,) held that it did not. It is assumed in in all the judgments that resort to the Hindu Widow Re-marriage Act was quite unnecessary to validate the marriage in question. We are afraid it is an assumption. If incapacity to re-marry is one of the incidents of Hindu marriage one does not see why it should not stick to a person even after conversion just as a person contracting a monogamous union is disqualified from contracting a polygamous union later though according to the law by which he is governed at the time of his second marriage, he may contract polygamous marriage. In this view, though S. 1 does not directly validate the Mahomedan marriage, it indirectly does that by removing the disqualification to re-marry from the incidents of Hindu marriage. In that view, the liberal interpretation of S. 2 accepted by the learned Chief Justice would be perfectly legitimate. On the other question the majority (Chief Justice & Oldfield, J.,) hold that under the general Hindu Law the widow forfeits her estate by re-marriage and the re-marriage being valid, it has that effect though the marriage was under the Mahomedan Law Mr. Justice Sheshagiri Aiyar on the other hand holds that the case is unprovided for in the Hindu Law. Assuming that the Hindu Law provides for forfeiture in the event of re-marriage. (There is no textual authority in support of the view possibly because the texts do not contemplate a second marriage), that law can contemplate only marriages solemnised under and valid in accordance with the Hindu Law and not to marriages entered into according to the rites and ceremonies of the Mahomedan Law. Under the Hindu Law (unaffected by legislation) conversion divested the estate and Hindu Law did not concern itself any further with him or her. This argument *prima facie* seems to be very strong. But there is another side to the question. Though it is true that the female is not governed by the Hindu Law after conversion, there is no justification for saying that the Hindu Law would not have taken cognisance of the

marriage relationship contracted under the Mahomedan Law. The proper attitude to take on such questions is to see what the Hindu Judges (Pradvivaka) would have done if they had to decide the question. They would have, we think applied the Mahomedan Law to the parties as their Jatidharma or Sreni Dharma. That is what is recommended by Manu to be done in respect of Mlechas, and Pashandas etc. The Hindu Law being inapplicable to the parties the Hindu Judge (the Pradvivakas) would have applied the Mahomedan Law. He would recognise that the customary law as to forfeiture by reason of conversion and the disqualification of the widow to contract a second marriage had been abrogated by Raja Shasana (or Kingmade law). He would also have held that the estate being one under the Hindu Law available for and during the widowhood of the female, determined and went to the reversioners.

Raichand Motichand v. Dhondo Laxman: I.L.R. 42 B. 728.

Instalment decrees are fairly common and yet, strangely enough, the application of the law of limitation to the execution of such decrees is not, even at this time of the day, free from doubts and difficulties in cases where in the event of default in punctual payment provision is made for the full amount being immediately recoverable. The absence, with reference to instalment *decrees*, of a provision similar to that made in the 3rd column of Art. 75 in the case of bonds, has been partly the cause of the trouble, but in many cases the discussion has been more as to the construction of the decree in question or as to the inference of waiver or estoppel to be drawn from the conduct of the parties. Most of the reported decisions on the point will be found collected in *Kashiram* v. *Pandu* [1] or *Girendra* v. *Khir Narayan* [2]. Where there is nothing beyond the factum of default in payment of the instalments, it is well established that the mere forbearance of the creditor, in spite of such default, cannot support an argument of waiver and limitation for recovery of the *full* amount will begin to run from the date of the first default. But apart from the argument as to waiver, there still remains the question, does the decree *cease* to be an instalment decree, once the default is made. The learned Judges in the case under notice clearly answer this in the affirmative ; but the recognition of the possibility of a waiver (in certain cases) is to some extent inconsistent with this view, for, if on the first default the decree ceases to be an instalment decree, it is difficult to see how the subsequent conduct of the parties can revive that part of the decree. In *Kashiram* v. *Pandu* [1] the learned Judges prefer to found their decision on a theory of estoppel instead of waiver, but even that won't quite fit in with the conclusion that as a *matter of law*, the occurrence of a default puts an end to the instalment portion of the decree and leaves only the other portion for full payment in force. It must however be admitted that the Allahabad view (*Shankar Prasad* v. *Jalpa Prasad* [3]) which makes the rule of limitation depend upon the construction of the decree is not very satisfactory either for it is not always easy to say whether on the language of a particular decree the provision in the event of default was

1. (1902) I L. R. 27 B. 1 2. (1909) I. L. R. 36 C. 394,
3. (1894) I. L. R. 16 A. 371.

only optional or compulsory and in many cases—especially where the arrangement is the result of a compromise—such decrees are drawn up in haste and without due regard to the exact significance of the language employed. And it has also to be borne in mind that in the absence of a definite statutory provision to the contrary, it is more consistent with the policy of the law of limitation to hold that time runs against a person from the earliest moment of time when he is *entitled* to take steps to enforce his rights ; it is, on the other hand scarcely right to speak of a person being *obliged* to institute a suit or take proceedings in execution.

Gopal Jayvant *v.* Shrinivas Vital : I. L. R. 42 B. 734.

Few people will be disposed to quarrel with the justice of the decision in this case that an assignee of a leasehold interest should not be held to have forfeited it by reason of the fact that *subsequent* to the assignment the original lessee has denied or repudiated the title of the lessor. But the matter seems to be one of first impression and it is not easy to state or gather any general principle whereby to define the acts by which or the extent to which an assignee may be affected by the conduct of his assignor subsequent to the assignment. One thing is clear that on an assignment, the assignor does not always or altogether cease to count. For instance, in the case of a mortgage, it is now well settled that a payment by the mortgagor-assignor will serve to give the mortgagee an extended period limitation not merely against the mortgagor but also against his assignee, and this although the payment be made *after* the assignment. Whether and how far a similar rule will apply to the remedies of a lessor against his lessee and the latter's assignee has not, so far as we know, been the subject of judicial discussion. But it is well settled that, in the case of a lease, the lessee does not, by reason of assigning away his term, cease to be liable to such of the obligations of the lease as rest on covenant, while as between the lessor and the assignee the latter is subject only to such of the covenants in the lease as run with the land. What then is the effect of a breach by the lessee of a 'personal' covenant where the lease-deed provides for re-entry on breach thereof. Can it be said that the assignee shall not suffer for such breach committed *after* the date of the

assignment ? An answer infavour of the assignee in such a case will practically nullify the terms of the lease for no fault of the lessor. And in this connection it must be remembered that an assignment of the lease may be made without the knowledge or consent of the lessor and even after the assignment the lessor may not come into direct relations with the assignee at all, for the assignment deed may provide for payment of the rent to the assignor himself (cf. *Beardmore* v. *Wilson*, [1] Woodfall Ch. VII. S. 5) In *Smith* v. *Gronow* [2] the question arose as to the effect under a re-entry clause, of the lessee's bankruptcy after he had assigned away the term *with the consent* of the lessor. Wright, J. held that there was no forfeiture of the term, basing his decision partly on the presumed intention of the parties in inserting the clause about bankruptcy, but he also laid stress on the fact that the assignment had taken place with the approval of the lessor.

[*End of Vol. XXXVI.*]

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1. (1868) L. R. 4 C. P. p. 57. 2. L R. (1891) 2 Q. B. 394.

NOTES OF RECENT CASES.

Chief Justice, Napier and Kumaraswami Sastri, JJ.
1919, January 6.

L. P. A. No 103 of 1917 F. B.

Lease—Covenant against alienation—Breach of—Forfeiture—Relief against—Power of court—Provisio in lease for forfeiture—Effect.

Where there is a forfeiture provided for in a mulgeni lease in the event of a breach of the covenant against alienation the court has no power to relieve against it.

B. Sitarama Rao for Appellant.

K. P. Lakshmana Rao for Responden

Phillips and Krishnan, JJ.
1919, January 12.

S. A. N. 795 of 1918.

Insolvency—Cylon Insolvency Ordinan 7 of 1853 S.124—certificate of conformity—Effect—Agreemen in Colombo to execute mortgage of proberties in Br. India and to turn money and to pay damages in default—Certificate of Confority in respect of liability under—Subsequent breach of agreement—Sit in Br. Indian Court for damages for—Maintainability.

Defendant entered into an agreemen with plantiff at Colombo to execute a mortgage in plaintiffs favour defendant's properties in British India and, in the event of defaul on his part, to re-pay the amount due to plaintiff and to pay a cer in amount as damages. Subsequently defendant applied in the Dist t Court of Colombo for and obtained a Certificate of conformity der S. 124 of the Ceylon Insolvency Ordinance No. 7 of 1853. As defe ant defaulted to execute the mortgage plaintiff sued in the British Ind n Court for the recovery of the amount due to him from defendant an of the damages provided for by the agreement. On the defendant ing the plea that the Certificate of conformity (corresponding to o order of adjudication) had, under S. 126 of the Ordinance No. 7 of 53, the effect of extinguishing defendant's liability and that the suit s therefore not maintainable, *held* that the Certificate had the eff of extinguishing defendant's liability notwithstanding that the int ion of the parties was that the agreement was to be performed in tish India

31 M. L. J. 386 followed.

N. Srinivasachariar for Appellant.

C. Padmanabha Aiyangar for *K, R. R aswami Aiyangar*, for Respondent.

Ayling and Seshagiri Aiyar, JJ.
1919, January 16.

A. S. No. 390 of 1917.

Interest—Award of—Power of court independently of Interest Act.

In a suit by one of the heirs of a deceased Mahomedan for the recovery with *interest* of her share of the property of the deceased from the other heir who was in exclusive possession thereof, *held* that independently of the provisions of the Interest Act, the court had jurisdiction to award interest to plaintiff by way of damages.

Hon. Mr. T. Rangachariar and *C. R. Subramaniya Aiyar* for Appellants.

Hon., The Advocate-General, K. Raja Aiyar, E.S. Chidambaram Pillai and *P. N. Marthandam Pillai* for Respondents.

Phillips and Krishnan, JJ.
1919, January 17.

S. A. No. 511 of 1918.

Civil Procedure Code—S. 64—Attachment—Order of—Alienation after, and before attachment under O. 21 R. 54, Cls. 1 and 2—Validity.

Held, that an alienation made by a Judgment-debtor after an order for the attachment of the property alienated but before the attachment was effected in the manner prescribed by O. 21, R. 54 Cls. 1 and 2 Civil Procedure Code was not invalid under S. 64 thereof.

K. S. Ganesha Aiyar for Appellant.

E. S. Chidambaram Pillai and *P. N. Marthandam Pillai* for Respondents.

Chief Justice Seshagiri, Aiyar JJ.
1919, January 20.

L. P. A. No. 70 of 1918.

Arbitration—Reference by Judge in pending suit—Judge himself one of arbitrators—Reference resulting in award—Decree in terms of award—Validity—Award if can be pleaded as adjustment—C. P. C.—Or. 23, R. 3—Applicability.

A Judge is not competent to make a reference in a suit pending before him to arbitrators of whom he himself is one. The rules in Schedule ii of the Code are applicable to such a case. But where the reference has resulted in an award, the award can be pleaded as an adjustment between the parties and a decree passed in the terms thereof under O. 23, R. 2 C. P. C. is Valid.

T. R. Ramachandra Aiyar, and *L. S. Veeraraghava Aiyar* for Appellant.

K. N. Kumaraswami Aiyar, for *L. A. Govindaraghava Aiyar*, for Respondent.

Abdur Rahim and Spencer, JJ.
1919, January 21.

A. S. No. 54 of 1918.

Partnership—Suit for dissolution—Loan by firm under dissolution to a going concern—Suit by one partner to recover his share of the loan—Maintainability—Deposit on 'Thavanai'—Limitation.

While a suit for dissolution was pending a partnership lent money to another firm, a going concern. One of the partners of the firm under dissolution brought a suit to recover his share in the money lent to the other firm.

Held, that the suit was not maintainable, and the plaintiff's remedy was to work out his rights in the suit for dissolution.

Held further that where money is deposited and payable on "Thavanai", the period of limitation runs from the date on which the "Thavanai" period expires.

K. Srinivasa Iyengar, K. Rajah Iyer and *T. R. Srinivasa Rajagopala Iyengar* for the Appellants.

A. Krishnaswami Iyer for the Respondents.

Abdur Rahim and Phillips, JJ.
1919, January 21.

S. A. No. 368 of 1918.

Easement—Right by prescription if can be acquired against person having limited interest.

Per Abdur Rahim (Phillips, J. dissenting).

The right to an easement cannot be acquired by prescription against a person having a limited interest in property in respect of which the right is alleged to have been acquired.

K. P. M. Menon and *B. Pocker* for Appellant.

C. Madhavan Nair and *C. Kunhiraman* for Respondents.

Oldfield and Seshagiri Aiyar, JJ.
1919, January 22.

C. M. S. A. No. 44 of 1918.

Limitation Act, Art. 182—Execution of decree—Application for—Proper court—Court which passed decree if a—Transfer of property sought to be proceeded against to jurisdiction of another court.

In this case their Lordships referred to the Full Bench the question whether the court which passed a decree would be the proper court within the meaning of Art. 182 of the Limitation Act even after the properties in respect of which execution is sought are transferred to the jurisdiction of another court.

A. Krishnaswamier and *T. M. Ramaswamier* for Appellant.

K. R. Rangaswami Iyengar for Respondent.

Oldfield and Seshagiri Iyer, JJ.
1919, January 23.

C. R. P. No. 112 of 1918.

Arbitration—Suit for Partition—One defendant declared Ex parte—*Matter referred to arbitration without his consent—Validity.*

In a suit for partition, one of the defendants was declared ex parte. Afterwards the matter was referred to arbitration but without the consent of the defendant, who was ex parte. On objection raised as to the legality of the reference. *Held,* that the reference was bad, as the defendant whose consent was not obtained was a person interested in the subject-matter of the suit.

C. V. Ananthakrishna Iyer and *M. S. Ramanujam* for *The Advocate-General* and *C. S. Venkatachariar* for the Petitioner.

P. Narayanamurthi for the Respondent.

Oldfield and Seshagiri Aiyar, JJ.
1919, February 4.

C. M. S. A. No. 75 of 1918.

Mortgage—Personal liability of mortgagor—Mortgagee's right to enforce—Failure to exhaust some mortgaged properties—Effect.

A mortgagee is not, except under exceptional circumstances, entitled to enforce the personal liability of the mortgagor without proceeding against all the properties included in his mortgage.

T. V. Gopalaswami Mudaliar for Appellant.

S. Varadachariar for Respondent.

Sadasiva Iyer and Napier, JJ.
1919, February 5.

S. A. No. 845 of 1918.

Hindu Law—Alienation by Father—Antecedent Debt—Mortgage with personal covenant—Sons' shares in joint family property—Liability.

Where a Hindu father mortgaged joint family property, when there was no necessity, and the mortgage-deed contained a personal covenant also, the question, whether the debt so created was an antecedent debt for which the sons' shares in the family property would also be liable, was referred to a Full Bench.

T. Narasimha Iyengar for the Appellant.

B. Sitarama Rao for the Respondents.

Oldfield and Sadasiva Aiyar, JJ.
1919, January 13.

S. R. No. 11391 of 1918.

Madras Civil Courts Act, S. 30—Madras City Civil Courts Act, S. 18—High Court circular under S. 30 of former Act—Notification by City Civil Judge under S. 18 of latter Act notifying arrangements for delivery of copies during vacation—Validity of—Copies ready during vacation but taken on re-opening day - Delay if any—Limitation Act, S. 12—Scope.

Purporting to act under the High Court circular made under S. 30 of the Madras Civil Courts Act, the City Civil Judge issued a notification in the *Fort Saint George Gazette* under S. 18 of the City Civil Courts Act to the effect that arrangements would be made for furnishing certified copies during the vacation. Certified copies of a decree and judgment became ready during the vacation but were taken delivery of only on the re-opening day. On a question arising in an appeal preferred against the decree and judgment as to whether the time between the date on which the copies were ready and the date of re-opening was to be counted against appellant, *held* that the High Court circular did not authorise the issue of the notification in question, that the said notification was *ultra vires*, and that appellant was therefore entitled to a deduction of the period in question.

A. C. Sampathaiyangar, for Appellant.

S. Gopalaswami Aiyangar, for Respondent.

Abdur Rahim and Spencer, JJ.
1919, February 4.

A. S. No 159 of 1918.

C. P. C., S. 92—Applicability—Temple subject to Devasthanam Committee—Appointment of additional trustee by committee—Suit by existing trustees for declaration of invalidity of appointment and for injunction against new trustee—Sanction—Necessity.

In a suit brought by the trustees of a temple subject to the superintendence of the Devasthanam Committee for a declaration that the appointment of an additional trustee by the committee was invalid on the ground that the committee did not exercise the power *bona fide* and in the interests of the temple and for an injunction restraining the newly appointed trustee from interfering with the affairs and management of the temple, *held* that the suit was not sustainable without sanction under S. 92, C. P. C.

Hon. T. Rangachariar and *E. S. Chidambaram Pillai*, for Appellants.

M. D. Devadoss, T. R. Ramachandraiyar and *A. Ramaswami Mudaliar*, for Respondents.

Coutts Trotter J.,
1919, February. 4.

C. S. No. 90 of 1918.

Civil Procedure Code, O. 32. r. 6—Payment of money to the managing member on behalf of minor member—Necessity of security.

In execution of a mortgage decree against the major and the minor members of a joint family, the mortgaged property was sold, and after the payment of the decree amount, there was a balance to the credit of the defendants. Held that such balance might be paid to the managing member without any security for the minor's share.

21 M. L. J. 1088; 25 M. L. J. 442 ; 35 Cal. 561. followed.

29 I. C. 475 not followed;

B. C. Seshachalla Aiyar, for the applicant.

M. Subbaroya Aiyar, for the decree-holder.

Chief Justice,
Oldfield, and
Seshagiri Aiyar, JJ.
1919, February 4.

S. A. No. 1815 of 1917. (F. B.)

Mortgage—Benami assignee of—Right to sue on mortgage.

Following the decision of the Privy Council in 36 M. L. J. 67 their Lordships *held* that an assignee of a mortgage is entitled to sue thereon even though he is only a benamidar for his assignor.

A. Krishnaswami Iyer and *S. Subramaniya Iyer*, for Appellants.

S. T. Srinivasagopala Chariar, *N. Rajagopala Chariar* and *R. Srinivasa Iyengar*, for Respondents.

Oldfield and
Seshagiri Aiyar, JJ.
1919, February 12.

S. A. No. 375 of 1918.

Inam—Issue of patta by Inam Commissioner in respect of non-inam lands—Grantee acquires no title.

The Government or the Inam Commissioner has no power to issue a patta in respect of lands other than inam lands and the issue of such a patta does not give the grantee any title to the lands.

K. V. L. Narasimham, for Appellant.

The Government Pleader, for Respondent.

Wallis, C. J. and Ayling, J. 1919, February 10.

A. S. No. 67 of 1918.

Hindu Law—Partition—Separation of one member—Fixing of his share—Effect of, on status of other members of the joint family—Plaint, filing of, effect of—Withdrawal of suit, effect of.

Where in a joint Hindu family one of the members separates, it is open to the remaining members to continue joint as before. If in order to fix the share of the out-going member it is necessary to determine the shares of the other members, that does not work a severance *inter se* among the remaining members. Where a member of a joint family institutes a suit for partition against the other members and gets a decree for partition as against one member only but withdraws the suit as against the rest on the ground that he wished to remain undivided with them, there is no severance in status between the member who sued for partition and those against whom the suit was withdrawn.

T. R. Venkatarama Sastri and *A. V. Visvanatha Sastri*, for Appellant.

K. Srinivasa Iyengar and *T. V. Muthukrishna Iyer*, for Respondent.

Abdur Rahim and Spencer, JJ. 1919, February 12.

A. S. No. 60 of 1918.

Limitation Act, Ss. 6, 7, 8, 15 (2) and Art. 121—Exclusion from joint family—Suit for partition—Plaintiff's, minors at time of exclusion—Knowledge of natural guardian—Limitation — Starting point—Notice under S. 80 C. P. C—Computation of period of limitation in S. 8—Period of notice if to be excluded.

The plaintiffs instituted a suit for partition, alleging that they were excluded from joint family property. They were minors at the time of exclusion, but their mother and natural guardian knew of the exclusion and tried, but ineffectually, to have their rights recognised. The suit was brought after 12 years from the original date of exclusion and more than 3 years after the attainment of majority by the plaintiffs. It was contended on their behalf, that time began to run only from the time when they came to know of the exclusion after the attainment of majority, as during minority they could not be presumed to have knowledge of the exclusion.

Held, that for purposes of the Limitation Act the knowledge of the guardian was the knowledge of the minor, and that the suit was barred. as time ran from the date when the exclusion came to the knowledge of the guardian.

Held, also, alternatively, that the suit was barred as it was brought more than 3 years after the attainment of majority by the plaintiffs.

Held, further, that in computing the period of limitation in S. 8 the period of notice to the Court of Wards (a defendant in the case) provided in S. 80 C. P. C. was not to be excluded under S. 15 (2), as the 3 years provided in S. 8 was the maximum period allowable, for a person to sue after the disability ceases.

K. V. L. Narasimham, for the Appellant.

V. Ramesam and *B. Jagannatha Das,* for the Respondent.

The Chief Justice and Kumaraswami Sastri, J.
1919, February 12.

A. S. No. 171 of 1918.

Land Acquisition Act—Land in possession of Kudivaramdar—Possibility of Melwaramdar and Kudivaramdar combining to convert the land into a building site—Element in determining compensation.

Where the land in possession of Kudivaramdar is acquired by Government, Courts, in determining the compensation payable, should take into consideration the possibility of the Melwaramdar and the Kudiwaramdar combining to convert the land into a building site.

A Krishnaswami Iyer, for the Appellant.

The Government Pleader (V. Ramesam). for the Respondent.

The Chief Justice, Oldfield, and Seshagiri Iyer, JJ.
1919, February 13.

S. A. No. 881 of 1917. (F. B.)

Transfer of Property Act, S. 58—Mortgage by conditional sale—Sale—A second deed agreeing to convey properties—Effect—Intention of parties—Construction of document surrounding circumstances.

Where a sale-deed is executed and subsequently another instrument is executed by the vendee agreeing to reconvey the property to the vendor on the payment of the money advanced within a certain date, even where they form parts of the same transaction, it is a question of construction of the documents, the intention of the parties, and the light thrown by the surrounding circumstances, whether the transaction is a mortgage by conditional sale or a sale with an option to re-purchase.

1. L. W. 80 overruled.

S. Muthia Mudaliar, for the Appellant.

A. Krishnaswami Iyer for *B. Sitarama Rao,* for the Respondent.

Abdur Rahim and Spencer, JJ.
1919, February 13.
A. S. No. 211 of 1918.

Limitation Act, art. 11—*Applicability—No investigation in claim—Claimant only seeking to have his objections recorded—Effect—Contract—Time when of essence—Kurivari—Stipulation for execution of security-bond within fixed time by bidder at auction and for forfeiture of amount of bid in default—Time if of essence.*

Art. 11 of the Limitation Act is inapplicable to a case in which the claimant in the claim proceedings only sought to have his objections recorded and did not pray for an investigation into his claim.

Where a kurivari provided that a subscriber bidding at an auction should execute a security bond for the amount of the bid within a time fixed for the purpose and that in default, he was to have no right to the amount, *held* that in such a case time was of the essence of the contract and that in the event of default on the part of the subscriber he forfeited his claim to the amount of the bid.

C. V. Ananthakrishnaiyar and *P. R. Ramakrishnaiyar*, for Appellant.

C. Madhavan Nair and *P. Eroman Unni*, for Respondents.

Oldfield and Seshagiri Aiyar, JJ.
1919, February 14.
S. A. No. 1036 of 1918.

Malabar Law—Tarwad—Male member—Living outside tarwad house with his wife in her tarwad—Right to pocket money for "Menchelavu."

A male member of a Malabar Tarwad living outside the tarwad house with his wife in her Tarwad is entitled to get from his Tarwad pocket money for "Menchelavu."

C. Madhavan Nair and *K. Kutti Krishna Menon*, for the Appellants.

C. V. Anantha Krishna Iyer, for the Respondents.

Abdur Rahim and Spencer, JJ.
1919, February 17.
A. S. No. 242 and 243 of 1918.

Estoppel—Land Acquisition Act Ss. 9 and 25—Acquisition of temple lands—Letter by trustee to Tahsildar—Statement in enquiry by Revenue Inspector—Claim of higher compensation before Collector—Estoppel.

Where certain temple lands were acquired by Government, and the trustee of the temple made a statement as to the rate of compensation in an enquiry by the Revenue Inspector with respect to certain

lands and in respect of other lands wrote a letter to the Tahsildar assessing the compensation at a certain rate, but claimed compensation before the Collector at a higher rate on the ground that the letter and statement were due to a mistake. It was contended for the Government that the statement and letter estopped the trustee from claiming higher compensation.

Held, that the trustee was not estopped, and that his action was sufficiently explained.

T. S. Ramasami Iyer, for the Appellant.

The Government Pleader, for the Respondent.

The Chief Justice Ayling and Kumaraswami Sastri, JJ.
1919, February, 17.

Full Bench
C. R. P. No. 150 of 1918.

Criminal Procedure Code, Ss. 195 and 476—*Termination of Judicial Proceedings—Facts relating to the offence coming to the knowledge of the Court afterwards—Whether Court can proceed under S.* 476—*The proper course in such cases.*

The circumstances that the facts constituting the offence come to knowledge of the Court after the termination of the Judicial Proceedings does not take the case out of the authority of the ruling in 34 Mad. 49.

Per Kumaraswami Sastri, J.—The proper procedure in such a case is that prescribed in S. 195 of the Criminal Procedure Code.

G. Annaji Rao, for the Petitioner.

The Public Prosecutor, for the Crown.

Abdur-Rahim and Spencer, JJ.
1919, February 19.

A. S. No. 254 of 1917.

Malabar Law - *Karnavan—Right to start trade—Losses in trade—Liability of other members therefor.*

Under the Malabar Law, a Karnavan of a tarwad cannot start a trade except with the consent of the other members and the latter are not liable for the losses of a trade started without their consent.

C. V. Anantakrishnaiyar, for Appellant.

K. P. M. Menon, B. Pocker and *K. Kuttikrishna Menon*, for Respondents.

The Chief Justice, Ayling and Kumarasami Sastri, JJ. 1919, February 18.

S. A. No. 1822 of 1917 (F. B.)

Res Judicata—Madras Survey and Boundaries Act Ss. 11 and 13—Dispute about boundary—Order of survey officer—Order not set aside within one year—Subsequent suit between parties—Order, if res judicata.

Where a dispute about a plot of vacant land between two houses, was referred to the surveying officer, and he passed an order deciding that the owner of one of the houses was entitled to the land and fixed boundary stones in accordance with his order, and where the party against whom the order went did not have it set aside by suit in a civil court within one year from the passing of such order, in a subsequent suit between the parties, the Full Bench held that the decision of the survey officer was *res judicata.*

M. S. Ramanuja Iyengar for *C. S. Venkatachariar* for the Appellant.

A. Venkatarayaliah and *L. Venkatanarasiah* for the Respondent.

The Chief Justice, Ayling and Kumarasami Sastri, JJ. 1919, February 18.

O. S. A No. 69 of 1917 (F. B.)

Letters Patent, Cl. 15—Judgment—Review of taxation of costs by Judge sitting on Original Side—Order—Appeal from, if lies.

Where at the instance of a party, a Judge of the High Court presiding on the Original Side makes an order under Rr. 38 and 39 of the Original Side fees rules after notice to the opposite party, reviewing the taxation of costs by the taxing officer, the order is a judgment within the meaning of Cl. 15 of the Letters Patent and an appeal lies from that order. 35 M 1 applied.

R. Subramania Iyer for the Appellant.

A. Narasimhachariar for *V. V. Srinivasa Iyengar* for the Respondent.

Bakewell and Phillips, JJ. 1919, February 18.

S. A. No. 905 of 1918.

Guardian—Father—Custody of child—Recovery—Proper remedy—Suit—Application under Guardian and Wards Act.

Where a father sought to recover the custody of his minor child rom his wife, who lived separate from him, Their Lordships referred to a Full Bench the question whether the proper remedy was by way of suit or application under the Guardian and Wards Act.

T. R. Ramachandra Iyer and *P. G. Krishna Iyer*, for the Appellant.

C. V. Anantakrishna Iyer, for the Respondent.

Bakewell and Phillips, JJ.
1919, February 18. } S. A. No 1172 of 1918.

Mulgeni base—Covenant against assignment by lessee—Breach of—No express clause for re-entry—suit by lessor for arrears of rent—Sale of lessee's interest in execution—Purchaser—Suit by for possession against assignee—Maintainability.

In a mulgeni lease there was a covenant against assignment of the lease, but there was no express clause for re-entry on breach of covenant by the lessee. The lessee assigned the lease to the defendant in the present suit, but the landlord then took no action. Subsequently the landlord sued the original lessee for arrears of rent which accrued subsequent to the assignment by the lessee. A decree was passed against the lessee and in execution of the decree the lessees interest was sold and purchased by the present plaintiff. As such purchaser the plaintiff brought a suit for possession against the assignee who was in possession.

Held, Per Bakewell, J.—On a construction of the lease, there was a clause for re-entry ; the lessor having waived the forfeiture was entitled to treat the original lease as subsisting and consequently the purchaser in execution of the lessee's interest was entitled to possession of the suit land.

Per *Phillips, J.* (dissenting)—There was no clause for re-entry in the lease and therefore the lessor could not treat the original lease as subsisting when the lessee had entirely assigned his interest to the defendant and that the purchaser in execution, the plaintiff in the present suit, acquired no right and was not entitled to maintain suit.

K. P. Lakshman Rao for the Appellant.

C. V. Anantakrishna Iyer for the Respondent.

Bakewell and Phillips, JJ.
1919, February 19.

S. A. No. 1342 of 1918.

Exchange—Immoveable properties—Defect in title—Deprivation of land received in exchange—Party deprived entitled to recover the land transferred by him—Specific performance of contract—Breach of condition—Limitation Act, Art. 143.

The parties to a registered deed of exchange of immoveable properties covenanted that in case any of them is deprived of the land received by him by reason of defect in title he should be entitled to get back the land transferred by him. The plaintiff was dispossessed, and he sued to recover the land which was his originally. It was contended on behalf of the defendant who was a transferee from the original party that the suit was for specific performance of a contract and therefore was barred, as it was brought after 3 years of the dispossession of the plaintiff and also that the clause did not affect the defendant.

Held, that the clause in the deed was really in the nature of a condition, namely. that the defendant's transferor was to enjoy the land as owner on condition that the plaintiff was not deprived of the land transferred to him by reason of defect in title and therefore the suit was for possession of immoveable property to which the plaintiff had become entitled by breach of condition and was governed for purposes of limitation by Art. 143 of the Limtiation Act.

Further Held, that the conditional clause affected not only the person who was party to the deed of exchange but also his transferees.

C. S. Venkatachariar and *M. S. Ramanuja Iyengar* for Appellant.

K. Narasimha Iyengar for the Respondent.

Oldfield and Seshagiri Aiyar, JJ.
1919, February 20.

L. P. A. No. 39 of 1918.

Small Cause Court—Order returning plaint for presentation to proper court—Re-presentation on original side and decree in suit—Appeal against decree—Validity of order of Small Cause Court if can be questioned in.

When a Small Cause Court returned a plaint for presentation to the proper court on the ground that the suit was not cognisable by a Small Cause Court and the plaint was accordingly re-presented on the original side and a decree passed therein, *held*, in an appeal perferred

against that decree, that the validity of the order of the Small Cause Court could not be questioned it having become final.

P. S. Narayanaswami Aiyar for *C. V. Anantakrishna Aiyar* for Appellant.

S. T. Srinivasagopala-Chariar for Respondent.

The Chief Justice and Ayling, J.
1919, February 20.

A. S. No. 245 of 1918.

C. P. C. S, 92—Applicability—Trust—Suit in respect of, for reliefs under S. 92—Suit against widow by reversioner entitled to succeed her as trustee—Maintainability —Sanction of Advocate-General—Necessity—Reversioner having individual interest—Effect.

A suit brought against a Hindu widow by a reversioner entitled to succeed her as trustee of certain charities for any of the reliefs mentioned in S. 92 of C. P. C. is not sustainable without the sanction of the Advocate-General, even though the reversioner may have an individual interest apart from that of the public.

C. V. Anantakrishna Iyer (*P. S. Narayanaswami Iyer* with him) for Appellant.

C. Madhavan Nair and *K. Kutikrishna Menon* for Respondent.

Bakewell and Phillips, JJ.
1919, February 24.

S. A. No. 698 of 1918.

Limitation Act—Art. 23—Suit for damages for malicious prosecution—Limitation—Starting point—Termination of prosecution—Meaning.

Where, in a suit for damages for malicious prosecution, it appeared that the complaint against the plaintiff was originally dismissed by the Joint Magistrate under S. 253 Cl. (2) Cr. P. C. that his order was set aside by the District Magistrate who ordered a re-trial, and that the order of the District Magistrate was in its turn upset by the High Court which held that the order of the Joint Magistrate amounted to an acquittal, *held* that the prosecution against the plaintiff must be deemed to have terminated within the meaning of Art. 23 of the Limitation Act by the order of the High Court and that the suit was not barred as it was instituted within one year of the High Court though more than a year after the date of the order of the Joint Magistrate.

V. Ramadoss, for Appellant.

T. Prakasam, for Respondent.

The Chief Justice and Ayling, J. 1919, February 26. — A. S. No. 122 of 1918.

Specific Relief Act, S. 42—Hindu Law—Widow setting up will by her husband authorising her to adopt—Suit by reversioner for declaration that will is a forgery—Maintainability.

Where a Hindu widow, who had inherited the properties of her husband, set up a will purporting to have been executed by the deceased and purporting to authorise her to adopt and the reversioner sued for a declaration that the will was a forgery, *held* that the suit was maintainable under S. 42 of the Specific Relief Act

35 M. L. J. 144 followed.

35 M. 592 referred to

V. Suryanarayana, for Appellant.

V. Ramadoss, for Respondent.

Abdur Rahim and Spencer, JJ. 1919, March 4. — A. S. No. 348 of 1917.

Mortgage with possession to A—Properties mortgaged including properties in which mortgagee had only mortgage right—Those properties redeemed by their owner during the period of A's mortgage—Effect on right's of parties.

Where *A* mortgaged with possession to *B* his jenmum right in certain properties and his kanom right in others on condition that the mortgagee was to be in possession of the same in lieu of interest and during the period of the mortgage the mortgagee was deprived of possession of the kanom properties by their owner who redeemed the same, *held,* in a suit for redemption by *A,* that his mortgagee was not entitled to claim payment of the amount represented by the annual profits of the kanom properties of which he was deprived because he must be deemed to have taken a mortgage thereof with the knowledge and subject to the condition that their owner might redeem them even during the period of his own mortgage.

C. V. Anantakrishnaiyar and *P. S. Narayanaswami Aiyar,* for Appellant.

A. Sivarama Menon, for Respondent.

Oldfield and Seshagiri Aiyar, JJ. 1919, March 6. — C. M. A No. 295 of 1918 and C. R. P. No. 1225 of 1918.

Execution or auction-sale—Bids at—Nature and incidents of—Effect of higher bid on lower bids—Death of highest bidder before

purchase—Next bidder if can be declared purchaser—Appeal by him against order declaring him purchaser—Maintainability—Civil Procedure Code, S. 47.

Where the highest bidder at an execution sale, the proclamation in which did not contain a clause restraining the highest bidder from withdrawing his bid, died and the Court declared the next highest bidder the purchaser at the sale and, on his default to pay the deposit amount, directed a re-sale of the property, *held*, in an appeal preferred by the next highest bidder against the order declaring him purchaser.

(1) That he was not the representative of the judgment-debtor within the meaning of S. 47, Civil Procedure Code, and the appeal was unsustainable:

(2) that a bid at an auction or execution-sale was in the nature of an offer which had to be accepted by the auctioneer or the Court within a reasonable time;

(3) that when at such sale there is a higher bid the lower bids must be deemed to have been not accepted and to have lapsed; and

(4) that the order of the Court below declaring the appellant the purchaser was without jurisdiction.

K. Srinivasa Aiyangar, V. Ramesam and *C. V. Rajagopalachariar*, for Appellant and Petitioner.

P. Narayanamurthi, N. R. K. Thathachariar and *C. Krishnamachariar*, for Respondent.

Bakewell and Phillips, JJ. 1919, March 6. — S. A. No. 1034 of 1918.

Malabar Law—Marumakkattayam Law—Gift to wife and children—Effect—Presumption—Right in gifted property of children of wife by another husband.

In the case of a gift by a person governed by the Marumakkattayam Law to his wife and children, the presumption is that the property, the subject of the gift, belongs to the tawazhi composed of the wife and her children by the donor and not to her children by another husband.

Where in such a case properties were purchased by the wife and her eldest son by the donor in their names and out of properties so gifted *held* that the properties so purchased belonged to their separate tawazhi alone.

C. V. *Anantakrishna Aiyar* and *K. P. Ramakrishna Aiyar* for Appellant.

K. P. M. Menon for Respondent.

Kumaraswamy Sastry, J.
1919, March 10.

C. R. P. 370 of 1918.

Suit for contribution—Previous judgment if admissible—Joint decree for costs—Liability to contribute among tort—Feasors.

Where a joint-decree for possession and costs was given in a suit against the defendant, and one of the defendants paid the costs and brought a suit for contribution against the other defendants in the previous suit *held*, confirming the decision of the Lower Court, that the previous judgment was admissible to show that all the defendants in the previous suit were joint tort feasors.

24 C. 330 dissented from.

25 M. 599, 25 C. 522 (F. B.) 24 B. 591, followed

and *held further*, that among joint tort feasors there is no liability to contribute for there is no equity *inter se*.

7 M. 89, 32 A. 585 followed.

Rajagopalan for *K. P. Shunmugam Pillai*, Vakil for Petitioner.

C. Ramarao, Vakil, for Respondent.

Oldfield and Seshagiri Aiyar, JJ.
1919, March 17.

C. M. A. No. 288 of 1918.

Provincial Insolvency Act, S. 6 (4) (c)—Act of Insolvency—The last day of the three months from the date of the Act of Insolvency falling on holiday—Petition presented on the re-opening day—Whether in time - General Clauses Act, Sec. 10.

Where the three months from the date of the act of insolvency expired on a holiday, a creditor's petition in insolvency is in time if presented on the re-opening day.

42 Mad. 13 and 23 M. L. J. 221 referred to.

C. A. Seshagiri Sastri for *T. M. Krishnaswami Aiyar*, for the Appellant.

N. Muthuswami Aiyar for *T. V. Muthukrishna Aiyar*, for the Respondent.

Oldfield and Seshagiri Aiyar, JJ.
1919, March 17.

C. R. P. No. 661 of 1918.

Civil Procedure Code Act V of 1908—Court of Small Causes—Whether has power to order attachment before judgment of immoveable property.

A Court of Small Causes has no power to order attachment before judgment of immoveable property.

6 M. H. C. reports 91 followed.

W. Kothandaramayya for the petitioner.

P. K. Janakirama Aiyar (amicus curiæ), for the Respondent.

Oldfield and Seshagiri Aiyar, JJ. 1919. March 18. — C. M. S. A. No. 17 of 1918. and C. R. P. No. 337 of 1918.

Civil Procedure Code, Sec. 60 (1) (e)—Attachment and sale of balance of the mortgage money due to the judgment-debtor mortgagor from his mortgagee—Whether liable to attachment and sale.

Where a judgment-debtor had executed a mortgage under which some portion of the mortgage amount remained unpaid by the mortgagee, a decree-holder against the judgment-debtor is not entitled to attach the balance of mortgage money, in execution of his decree because there is no debt owing by the mortgagee to the judgment-debtor ; on the other hand the judgment-debtor has only a right to damages as against his mortgagee which is not liable to attachment under Sec. 60 (1) (e) of the Civil Procedure Code.

K. V. L. Narasimham and *K. S. Ganesa Aiyar*, for the Appellant.

T. M. Krishnaswami Aiyar, for the Respondent.

Ayling and Napier, JJ. 1919; March 19. — S. A. No. 1061 of 1917.

Civil Procedure Code O. 21, Rules 58 to 63—Limitation Act—Article 11—A claim based on a simple mortgage, whether falls within the scope of O. 21 R. 58—Mortgagee putting forward a claim—Claim dismissed as too late—Whether mortgagee can bring a suit on his mortgage without bringing a suit under O. 21. R. 63.

A claim based on a simple mortgage and praying that the property of the judgment-debtor which is attached should be sold subject to the mortgage is a "claim or objection" falling within the provisions of O. 21 R. 58. Where a claim petition based on a simple mortgage is disposed of against the claimant, he cannot sue on the mortgage without bringing a suit under O. 21 R. 63 within one year from the date of the order.

41 Bom. 64 distinguished ; 41 Mad. 985 followed.

C. A. Seshagiri Sastri for *K. V. Krishnaswami Aiyar*, for the Appellant.

A. Subbarama Aiyar, for the Respondent.

Oldfield and Seshagiri Iyer, JJ. 1919, March 18.

S. A. No. 1169 of 1918.

Transfer of Property Act, S. 52—Suit by prior mortgagee without impleading subsequent mortgagee—Decree—Purchase subsequent to the decree, of the equity of redemption by subsequent mortgagee—Lis Pendens—*Unregistered mortgage deed—Decree—Validity.*

A subsequent mortgagee of certain properties purchased the equity redemption by private sale. Before such purchase, the prior mortgagee brought a suit on his mortgage but without impleading. The subsequent mortgagee, and obtained a decree. The subsequent mortgagee, when the mortgaged property was brought to sale in execution of the decree, put in a claim petition. It was dismissed. Then he brought the present suit for a declaration that the decree was not binding on him.

Held, that his rights as purchaser of the equity of redemption were affected by *lis pendens,* but that his rights as subsequent mortgagee remained unaffected.

A decree on an unregistered mortgage (over Rs. 100) is valid until set aside.

M. S. Ramanuja Iyengar, for *C. S. Venkatachariar,* for the Appellant.

S. Varadachariar, for the Respondent.

The Chief Justice, Oldfield, Sadasiva Iyer, Coutts Trotter and Seshagiri Iyer, JJ.

F. B.
S. A. No. 94 of 1917.

Malabar Tenants Improvements Act—Lease of several items of property—Assignee of one item—Suit by, to eject tenant—improvements over other items—Claim to hold over till compensation is paid.

Where several items of property were leased to a tenant and the assignee from the landlord in respect of one item sued to eject the tenant from his land, it was contended for the tenant, who had carried out improvements on the other items leased to him, that the tenancy was of all the items and that he (tenant) was entitled to remain till he was paid compensation for the improvements he had carried out, although they were not on the suit land.

Held, (*Seshagiri Iyer, J*, dissenting) that the assignee was entitled to maintain the suit in ejectment and that the tenant was not entitled to lien a over the suit land in respect of improvements carried out on other pieces of land.

N. P. Narasimha Iyer, for the Appellant.

T. Eromani Unni, for the Respondent.

Oldfield and Seshagiri Iyer, JJ. 1919, March 25.

C. M. S. A. 87 of 1918.

Limitation Act, Art. 180—Sale in Execution of decree—Subsequent application to set aside sale more than 30 days after sale—O. 21, R. 89 C. P. C.—Application for delivery of possession by purchaser more than 3 years after the confirmation of sale—Limitation.

After more than 30 days after the sale in execution of a decree, the judgment-debtor applied to set aside the sale under O. 21, R. 89 C. P. C. The sale was partly set aside. The execution purchaser put in a petition for delivery of possession more than 3 years after the original confirmation of sale but within 3 years of the order partly setting aside the sale. The question whether the application was not barred by limitation was referred by their Lordships to a Full Bench.

K. Bhashyam Iyengar, for the Appellant.

B. Sita Rama Rao, for the Respondent.